NICK BUSHELLE
1432 SE Quartz Lane, Waukee, IA 50263 | (630) 251-3420 | nbushelle@gmail.com
Permanent Address: 24410 W Blvd Dejohn, Naperville, IL 60564

Hon. Elizabeth W. Hanes
U.S. District Court for the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

August 21, 2020

Dear Judge Hanes,

I recently graduated from the University of Iowa College of Law and am submitting my resume for the law clerk position beginning August 2021. I am working as a law clerk for the Iowa Fifth Judicial District Court in Des Moines for the 2020-2021 term, where I am performing research, writing, and administrative functions for multiple trial judges. I want to serve the nation by helping you fairly resolve parties' disputes. I believe I would be a valuable asset to you due to my strong work ethic and eagerness to learn.

My experience has prepared me to perform well as a federal law clerk. I will bring one year of experience as a law clerk with a state trial court that will be directly applicable to working at a federal trial court. My work with the Iowa Law Review has greatly improved my writing and citation skills and my note was published last fall. Last spring I did an externship in with a venture capital fund and a nonprofit startup accelerator focused on funding and supporting entrepreneurship in eastern Iowa, where I engaged in a variety of transactional work and communicated with employees, investors, and portfolio companies. I worked last summer at the Iowa Department of Revenue, where I wrote two declaratory orders and an abatement order, researched income tax, sales tax, property tax, and administrative law, and assisted in-house counsel with advising Department employees. During the previous summer with the Gierach Law Firm, I drafted a motion to dismiss for a non-compete agreement case, drafted estate planning documents, and researched estate planning and business law. I developed my research skills by working as a legal research assistant for Professor Osiel researching tort and criminal topics and for Professor Yockey researching corporate topics. I found the experience of volunteering for an online legal clinic answering legal questions for low income households in the Iowa City area to be very rewarding and would like to continue doing work to serve the community.

I would greatly appreciate the opportunity to speak further about a position. I am available by phone or email.

Sincerely,
Nick Bushelle

NICK BUSHELLE
1432 SE Quartz Lane, Waukee, IA 50263 | (630) 251-3420 | nbushelle@gmail.com
Permanent Address: 24410 W Blvd Dejohn, Naperville, IL 60564

EDUCATION

The University of Iowa College of Law Iowa City, IA
Juris Doctor, GPA: 3.49 May 2020
Honors: Dean's Award for Academic Excellence (highest grades) in Administrative Law & Constitutional Law I; Faculty Award for Academic Excellence (2nd highest grade) in Business Associations
Activities: Iowa Law Review, Student Writer
Publication: Appearance Is Everything: Why Imposing Expenditure Limits on Hybrid PACs Without Functional Separation Is Essential to Democracy, 105 Iowa L. Rev. 341 (2019)

The University of Illinois at Urbana-Champaign Champaign, IL
Bachelor of Science, GPA: 3.81 Dec 2016
Natural Resources and Environmental Science, minor in Political Science
Honors: Graduated in 2.5 years; Dean's List (over 3.7 GPA) for 3 semesters; James Scholar (4 honors courses, graduate course, paper/presentation on judicial campaign donations affecting how fracking is zoned)
Activities: Illini Biodiesel Initiative, Member (converted waste vegetable oil from the dining halls to biodiesel); ACES Without Borders, Member (assisted foreign exchange students in their transition to Illinois)
Study Abroad: Superior Institute of Agriculture Santiago, Dominican Republic Jan 2015

EXPERIENCE

Iowa Fifth Judicial District Des Moines, IA
Law Clerk Aug 2020-Jul 2021
- Performed research, writing, and administrative functions for multiple trial judges

New Bohemian Innovation Collaborative Cedar Rapids, IA
Legal Extern Jan 2020-May 2020
- Advised a venture capital fund and a nonprofit that invested in and trained Eastern Iowa startups
- Researched securities, tax, contracts, corporate governance, and strategic planning
- Communicated with prospective investors and portfolio companies
- Drafted employment agreements, stock purchase agreement, and various securities documents

The University of Iowa College of Law Iowa City, IA
Legal Research Assistant for Prof. Mark Osiel and Prof. Joseph Yockey Aug 2018-May 2020
- Researched tort, criminal, contracts, corporate, and international law

Iowa Department of Revenue Des Moines, IA
Legal Services and Appeals Intern/Law Clerk May 2019-Jul 2019
- Drafted two declaratory orders and an abatement order for the Director
- Researched state income tax, sales tax, property tax, and administrative law
- Revised administrative rules

The Gierach Law Firm Naperville, IL
Legal Intern May 2018-Jul 2018
- Researched estate planning and business law
- Drafted motion to dismiss for employment agreement case

The University of Iowa, Citizen Lawyer Program: Iowa Free Legal Answers Iowa City, IA
Legal Clinic Volunteer Oct 2017-May 2018
- Researched and answered legal questions at an online legal clinic for low income households

Nick Bushelle
University of Iowa College of Law
Cumulative GPA: 3.49

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Law and Legal Reasoning	Hughes	P	1	
Contracts	Burton	4.0	4	
Property	Odinet	3.2	4	
Torts	Tilley	2.8	4	
Legal Analysis Writing and Research I	Liebig	3.4	2	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Associations	Shill	4.1	3	
Legal Analysis Writing and Research II	Sheerin	3.2	2	
Criminal Law	Hughes	3.2	3	
Civil Procedure	Bauer	3.5	4	
Constitutional Law I	Gowder	4.3	3	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Law Review	Pettys	P	1	
Constitutional Law II	Pettys	3.3	3	
Basic Federal Income Taxation	Grewal	2.6	4	
Evidence	Sullivan	3.3	3	
Criminal Procedure: Investigation	Seo	3.6	3	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Mergers and Acquisitions	Miller	3.5	3	
Professional Responsibility	Hughes	3.3	3	
Private Companies	Yockey	3.3	3	
Corporate Taxation	Jones	3.7	3	
Law Review	Pettys	P	1	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

Bankruptcy	Carlson	4.0	3
Securities Regulation	Yockey	3.4	3
Administrative Law	Reitz	4.2	3
Interest-Based Negotiation for Lawyers	Gittler	3.9	3
Trusts and Estates	Gallanis	3.3	3

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Field Placement: New Bohemian Innovation Collaborative	Tai	P	4	
Principles of Contract Drafting	Tai	P	3	
Corporate Finance	Miller	P	3	
Field Placement Seminar	Tai	P	2	

Nick Bushelle
University of Illinois-Urbana-Champaign
Cumulative GPA: 3.81

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Animal Biology		P	4	
Intro Computing: Non-Tech		A	3	
Introduction to NRES		A	3	
Economic Statistics I		A	3	
Discovering Sys of Caribeean		A	3	
Contemporary Issues in ACES		A	2	
Public Speaking		A-	3	

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introductory Microbiology		A+	3	
Natural Resource Economics		AH	3	
Adv Rhetoric & Composition		A	3	
Introduction to Plant Biology		B	4	
Geographies of Globalization		A	3	
General Chemistry I		B	3	
General Chemistry Lab I		A+	1	

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
The US Constitution I		A	3	
Principles of Ecosystem Mgmt		A+H	3	
Introductory Soils		A	4	
Renewable Energy Policy		A+	3	
Environmental Economics		A	3	

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Environmental Law		A+	3	
Environment and Society		A+	3	
Intro to Political Theory		B+	3	
Integrative Ecosystem Mgmt		A	3	
The US Constitution II		A	3	

Chainsaw Safety & Felling Tech	A	2

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Stream Bioassessment Field Exp		A+	1	
Democratic Theory		A-	3	
Fish and Wildlife Ecology		A-H	3	
Intermediate Social Statistics		A-	3	
Aquatic Ecosystem Conservation		B+	3	
Law and Regulation		A-	2	
GIS in Natural Resource Mgmt		B+	4	
Environ Social Sci Res Meth		A	3	

AP Credit/Summer Course

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
General Chemistry II		A	4	
Calculus		P	5	
US Hist to 1877		P	3	
Intro to US Gov & Pol		P	3	
Writing and Research		P	4	
Western Civ Since 1660		P	3	
Fundamentals of Env Sci		P	3	
Intro Lit Study for Non-Majors		P	3	
Intro to Comp Polictics		P	3	
Calculus II		P	3	
General Chemistry Lab II		A	1	
US Hist Since 1877		P	3	
Microeconomic Principles		P	3	
Macroeconomic Principles		P	3	

I received 35 credit hours from AP tests in high school. I took General Chemistry II at the College of Dupage during summer 2015.

Grading System Description

Out of 4.0.

August 24, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write in support of my current Research Assistant, Nicholas Bushelle, who seeks employment in your organization.

Nick has worked for me during two academic years, and he quickly distinguished himself as the most diligent and energetic of all my nine R.A.s during this period. Though his c.v. may not stand out in any obvious way from the large pile of other such documents probably on your desk, Nick makes the very most of his substantial endowments, displaying an unusually rigorous commitment and earnest dedication where others may stand out in more conventional ways. His response to my research inquiries are always prompt and incredibly thorough. He is also extremely good at anticipating what I will want next from him on the basis of what he has found for me in preceding tasks, showing that he is not only good with details but also at retaining a sense of the big picture, the larger context for more discrete inquiries.

In the years I have worked with him, Nick has completed an unusually large number of projects for me. These have drawn upon his skills both in legal writing and in general research on a far-ranging set of topics, from Title IX investigations at U.S. universities to the science of brain development. The results of his concerted effort have been invaluable to my current book project. I have come to place great confidence and to depend very heavily on him.

Nick is not only a very fine lawyer but also seems like someone who would be easy to work with in an office setting, someone pleasant to have around.

As you will observe from his c.v., Nick reveals an unusual array of well-honed skills, talents, and areas of serious professional and scholarly interest, ranging from agricultural law and tax issues to campaign finance law.

I have no reservations regarding Nick and would be happy to answer any questions you may have about him. I recommend him with great enthusiasm.

Cordially,

Mark J. Osiel
Aliber Family Professor
College of Law
University of Iowa

August 24, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am honored to recommend Nicholas Bushelle for the position of clerk in your Chambers. As I will illustrate below, Mr. Bushelle exemplifies all the attributes of a successful student, clerk, and attorney. He is a talented legal writer, a critical and analytical thinker, and a warm, thoughtful person.

I first met Mr. Bushelle in Spring 2019 when he enrolled in my*Private Companies* course at the University of Iowa College of Law. Though soft-spoken and rarely one to volunteer in class, it became clear from the start that Mr. Bushelle possesses a serious intellect. He always demonstrated a firm grasp on the material when called upon, and his responses to questions and hypotheticals confirmed how clearly and deeply he thinks about the law. He is a hardworking and passionate learner. As part of the course, I routinely assign students to small groups to work through complex practical simulations and take-home projects. In these settings, I observed that Mr. Bushelle treats others with respect, fairly and deliberately considers others' views, examines all sides of an issue, and provides wise counsel. I believe these traits will serve him well as a clerk and throughout his entire career.

Indeed, on the strength of his performance in*Private Companies*, I hired Mr. Bushelle as my research assistant for the current academic year. His work so far has been excellent. He is an efficient and clear writer, as well as a thorough and skilled researcher. He meets all deadlines and asks smart questions about his assignments. I have no doubts about his professionalism or lawyerly skill. I am also confident that Mr. Bushelle will fit in well with everyone in your Chambers. He is well-rounded and kind.

In closing, thank you for considering Mr. Bushelle for this position. Please do not hesitate to contact me if I can be of any additional help.

Sincerely,

Joseph W. Yockey
Professor of Law and Michael and
Brenda Sandler Faculty Fellow in Corporate Law

August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend Nicholas Bushelle for a clerkship with your court. He is a talented student and did extraordinarily well in my class, and I believe he would be an excellent addition to your chambers.

Mr. Bushelle was a student in my Business Associations class during spring 2018. On the basis of his outstanding final exam performance, he received the second-highest grade in the class of 49 students (a 4.1 out of 4.3, which at Iowa is the top end of the "A" range but would be considered an "A+" elsewhere). The size of the class did not permit as much personal interaction as I would have liked, but I nevertheless came to know Mr. Bushelle as an active voice in class, volunteering often (but not too often) and offering intelligent responses to questions. We also met during office hours on a number of occasions, and I found him unfailingly polite and a pleasure to get to know.

Based on Mr. Bushelle's performance in my class, my interactions with him outside of class, and my own experience as a former judicial clerk (for Judge Jennifer W. Elrod of the U.S. Court of Appeals for the Fifth Circuit), I believe he would be a very valuable asset to you in chambers.

Please do not hesitate to contact me if you would like to discuss his candidacy further.

Sincerely,

/s/
Gregory Shill
Associate Professor of Law
University of Iowa College of Law
gregory-shill@uiowa.edu

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

CORPORATION A, INC.	)	
	)	
Plaintiff,	)	
	)	No. 2018L123456
vs.	)	
	)	
CORPORATION B, INC.	)	
	)	
Defendant.	)	

COMBINED MOTION TO DISMISS COMPLAINT AT LAW PURSUANT TO 735 ILCS 5/2-619 AND 735 ILCS 5/2-615

Defendant, Corporation B, Inc., by and through its attorneys, The Gierach Law Firm, hereby states the following as its Combined Motion to Dismiss Complaint at Law Pursuant to 735 ILCS 5/2-619 and 735 ILCS 5/2-615:

Statement of Facts

Parties

The Defendant, Corporation B, Inc. ("Corp B"), is a roofing repair and replacement company located in Somonauk, IL. The Plaintiff, Corporation A, Inc. ("Corp A"), is a roofing repair and replacement company with a location in Downers Grove, Illinois, allegedly 40 miles away from Corp B, and a new location in 2018 in Aurora, IL, allegedly 25 miles away from Corp B, which was not in existence when Corp B was created and chose a location in 2016. Following their resignations or terminations from Corp A at varying times and for varying reasons, a number of individuals began at varying times to work as common salesmen or roofers for Corp B, including: John Locke, Adam Smith, Thomas Paine, John Mill, and Milton Friedman ("Former Corp A employees").

According to the complaint, during their employment with Corp A, Corp A presented the former Corp A employees with different versions of an Employment Agreement, which included a Nondisclosure, Nonsolicitation, & Noncompetition provision. Corp A did not provide any

additional compensation or other incentive to the former Corp A employees in exchange for signing the agreements and some agreements may have provided that employment with Corp A was "at will." Copies of the Employment Agreements are not attached because Corp A neglected to attach them to its complaint. The complaint alleges that the former Corp A employees signed the Employment Agreements.

The Employment Agreements, a part of which was presented in the complaint, prevented the former Corp A employees from disclosing trade secrets and other confidential information, from accepting any job turned down by Corp A offered by any current, *future*, or *prospective* client of Corp A, and from accepting or engaging in employment with a company engaging in similar business within a fifty mile radius of Corp A for twenty-four months. The former Corp A employees were common salesmen and roofers, who were not privy to any confidential information in their work and that work was performed substantially the same as other roofing businesses. Collectively, the restrictive covenant provisions prevent the former Corp A employees from doing any work anywhere in the Chicago metropolitan area where they live for two years after leaving Corp A.

Procedural History

The Plaintiff previously filed suits in Dupage County against John Locke and Adam Smith for breach of contract based on the same or similar Employment Agreements at issue here. The suits were dismissed for lack of subject matter jurisdiction due to an arbitration clause. The complaints in those suits also lacked specificity of facts. The Plaintiff tried for relief out of the same series of transactions again, this time against Corp B, by filing its three-count Complaint at Law based upon conversion, tortious interference with business relationships, and violation of the Illinois Trade Secrets Act ("ITSA") on April 27, 2018. A copy of the complaint is attached as Exhibit "A."

735 ILCS 5/2-619

The complaint should be dismissed with prejudice pursuant to § 2-619 because (1) Corp A failed to attach copies of alleged Employment Agreements and (2) the Court lacks subject matter jurisdiction due to the likely existence of an arbitration clause.

Failure to Attach

§ 2-619 (a)(9) provides for dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." One defect falling under § (a)(9) is the requirement in § 2-606, which requires that if a claim is founded upon a written instrument, a copy thereof must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to the pleading an affidavit stating facts showing that the instrument is not accessible to him. 735 ILCS 5/2-606. An actual copy of the written instrument must be included, not just something similar. Tooke v. Soo Line R.R. Co., 2016 IL App (1st) 153514-U, ¶ 24-25 (1st Dist. 2016).

Corp A's claims are founded upon alleged Employment Agreements. Corp A provided part of one Employment Agreement in the complaint but did not provide anything else. Corp A must include a complete copy of each and every Employment Agreement the former Corp A employees signed. Corp A did not include an affidavit stating that the Agreements were not accessible. These Agreements should be accessible since they are fairly recent documents that Corp A should have maintained. Not including the Employment Agreements prevents the Defendant from being able to form an adequate defense.

Lack of Subject Matter Jurisdiction

§ 2-619 (a)(1) provides for dismissal for lack of subject matter jurisdiction where the defect cannot be removed by transfer. Corp A previously filed suits in DuPage County against John Locke and Adam Smith for breach of contract based on the same or similar Employment Agreements at issue here. The suits were dismissed for lack of subject matter jurisdiction due to

an arbitration clause, so it is likely that the Employment Agreements here also have arbitration clauses which require dismissal for lack of subject matter jurisdiction since transfer to another court would not fulfill the arbitration requirement.

Wherefore, for the reasons stated above, Corp B respectfully requests that the Court dismiss the Plaintiff's Complaint at Law, with prejudice, and enter an award for attorneys' fees for the amounts expended in bringing this motion and for any other such relief that this Court deems equitable and just.

735 ILCS 5/2-615

The complaint should be dismissed with prejudice pursuant to § 2-615 because Corp A failed to allege sufficient specific factual allegations for counts of (1) conversion, (2) tortious interference with business relationships, and (3) violation of the ITSA and (4) failed to allege the counts were supported by an enforceable restrictive covenant. Corp A does not specify how it has been harmed to justify asking for $500,000 in damages for each count, which makes the amount arbitrary. Since Illinois is a fact pleading jurisdiction, under § 2-615 a plaintiff is required to allege facts which establish his claim as a viable cause of action and inform the defendant of the nature of the claim and is not allowed to rely on mere conclusions. Napleton v. Village of Hinsdale, 229 Ill. 2d 296, 305 (2008).

Conversion

Conversion with respect to trade secrets and any other competitively secret information not independent of the ITSA is preempted by the ITSA, First Fin. Bank, N.A. v. Bauknecht, 71 F. Supp. 3d 819, 847-48 (C.D. Ill. 2014), so the conversion count cannot stand since proprietary information, trade secrets, client lists, and sales and marketing strategies are generally considered competitively secret information. Trademarks are public and an action for trademark

infringement must be brought under federal law not under conversion. Foodworks USA, Inc. v. Foodworks of Arlington Heights, LLC, 2015 WL 1343873 (N.D. Ill. 2015).

If the conversion claim is allowed to be considered, Corp A failed to allege (1) wrongful taking by Corp B of Corp A's property, (2) Corp A's right in the property, (3) Corp A's right to immediate possession, and (4) a demand by Corp A for possession. Eggert v. Weisz, 839 F.2d 1261, 1263 (7th Cir. 1988). The complaint does not specify what specific property was stolen, how regular employees came in contact with the property, when and where the conversion took place, and how the property was kept secret or secured. Corp A failed to include the restrictive covenant terms so it is unknown exactly what property was restricted. Corp A does not allege what property it has made a demand upon Corp B to return.

Tortious Interference With Business Relationships

Corp A failed to allege that (1) Corp A had a reasonable expectancy of a valid business relationship with a third party, (2) Corp B knew of the prospective relationship, (3) Corp B intentionally interfered with the relationship so the relationship never materializes, and (4) the interference damaged Corp A. Lynch Ford, Inc. v. Ford Motor Co., 957 F. Supp. 142, 146 (N.D. Ill. 1997). The complaint fails to state which of Corp A's clients Corp B contacted or entered a business relationship with or when, where, and how it happened. Corp A failed to include the restrictive covenant terms so it is unknown which business relationships were off limits to Corp B. The complaint does not explain how Corp A acquired their clients, but if it was through the equivalent of going through a phone book and anyone could replicate its client lists with little effort, the client lists are not protected from being used by others. Liebert Corp. v. Mazur, 357 Ill. App. 3d 265, 277 (1st Dist. 2005). It is unlikely that client lists would have any value since clients do not need roof repair often enough to make them repeat customers. The complaint does not explain how Corp A has a reasonable expectation of a valid business relationship with Corp

B's clients or how Corp B would know of the prospective relationship when they are located 40 miles apart and most likely have completely different markets. Corp B could not have known of Corp A's prospective business relationships near Aurora, 25 miles from Corp B, in 2016 when Corp B incorporated, because Corp A did not have an Aurora office until 2018.

Violation of the ITSA

Corp A failed to allege misappropriation of trade secrets, defined under the ITSA as (1) having value derived from disclosure or use and (2) are the subject of efforts to maintain secrecy or confidentiality. 765 ILCS 1065/2. The complaint fails to allege what trade secrets were supposedly misappropriated. It is unlikely Corp A had any trade secrets in the roofing business, but if it did, Corp A failed to allege how common salesmen and roofers would have access to the secrets and how Corp A protected the secrets. Additionally, trademarks should not have been included in the ITSA count, as trademarks are not trade secrets, since they are public knowledge and regulated under federal law, not the ITSA. Client lists are not trade secrets if Corp A obtained clients by the equivalent of going through a phone book and anyone could replicate its client lists with little effort, Liebert Corp., 357 Ill. App. 3d at 277, and probably would not have any value since people do not need roof repairs very often.

Unenforceability of Employment Agreements

Corp A failed to allege that the three counts are supported by a valid restrictive covenant. To be valid, a restrictive covenant must (1) be ancillary to a valid contract, (2) be supported by adequate consideration, and (3) be reasonable. McInnis v. OAG Motorcycle Ventures, Inc., 2015 Ill. App. 142644, ¶ 26 (1st Dist. 2015). Where continued employment is less than two years' duration, additional consideration is required to support a restrictive covenant for at will employees. Id. at ¶ 27. A restrictive covenant is reasonable where it (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee, (2) does

not impose undue hardship on the employee-promisor, and (3) is not injurious to the public, considering all circumstances. Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393, 396 (2011). The extent of the business interest may be limited by the type of activity, geographical area, time, Id., and near permanence of clients. Paul Joseph Salon & Spa, Inc. v. Yeske, 2017 IL App (2d) 170462, ¶ 8 (2d Dist. 2017). Activity that is not a highly skilled trade or occupation, considering duration of training and uniqueness of methods, may eliminate business interest. Novamed, Inc. v. Universal Quality Solutions, Inc., 2016 IL App (1st) 152673-U, ¶ 44 (1st Dist. 2016). In House of Vision, Inc. v. Hiyane, a restrictive covenant preventing work as a contact lens grinder and fitter within a thirty mile radius in the Chicago metropolitan area where the contract was seeking to protect interest in clients was found overly broad. 37 Ill. 2d 32 (1967).

Since Corp A has failed to attach the Employment Agreements and allege when each was signed and when each former Corp A employee left, it is unknown whether there was adequate consideration for each Employment Agreement. However, if any employee was terminated before two years after signing an Employment Agreement, no compensation was given in addition to not being fired, and employment was at will, consideration was inadequate and the contract unenforceable.

Corp A's restrictive covenant is overly broad and does not meet any of the elements of reasonableness. The former Corp A employees were not directors or managers, but regular employees without access to confidential information and who did not perform highly skilled trades since the training and methods were not complicated or unique, so the restriction on disclosing confidential information does not protect any legitimate business interest. The restrictions which prevented the former Corp A employees from accepting any job Corp A turned down offered by any current, future, or prospective Corp A client are overly broad

because if Corp A turned down a job, then for the public interest in free trade, the job should become open to anyone. Restrictions on accepting or engaging in employment with a company engaging in similar business within a fifty mile radius for twenty-four months are overly broad and do not protect any legitimate business interest, shown by the ruling in House of Vision that a thirty mile radius in Chicagoland was too broad, and because Corp A has failed to specify any reasons for drawing the line where it did, such as where its clients are located and how activity within the restricted area and time would injure it. It is also unduly burdensome on the former Corp A employees because the restrictions prevent them from doing any work anywhere in the Chicago metropolitan area where they live. Additionally, breach of contract would be the proper cause of action here if the contract was enforceable, but it was not included because Corp A knows the contract is unenforceable. Breach of contract was already attempted in two previous suits against individual former Corp A employees and Corp A was unsuccessful.

Attorney Fees

Corp B is entitled to attorney fees and any other reasonable expenses incurred because of the filing of the complaint because the suit was filed for the sole reason of harassment and to put a competitor out of business to allow Corp A to move into a new market. Ill. Sup. Ct., R 137(a) provides that the signature of an attorney on a complaint constitutes a certificate that to the best of his knowledge formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the modification of existing law and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Where there is a violation of the rule, the court may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party the amount of reasonable expenses incurred because of the filing of the complaint including reasonable attorney fee. Id. In Pepsi MidAmerica, Inc. v.

Mullinax, allegations that a Pepsi employee who serviced and filled vending machines breached a restrictive covenant, without including sufficient evidence in the complaint, resulted in sanctions with attorney fees. 2013 IL App (5th) 120396-U (5th Dist. 2013).

Like the vending machine maintenance person in Pepsi, the former Corp A employees, as common salesmen and roofers, did not gain any special skills or access to confidential information and there is a lack of evidence in the complaint pointing to any specific skills or information, indicating that Corp A either did not make a reasonable factual inquiry or filed the suit to harass while knowing that it was groundless. Corp A and Corp B are in entirely different markets and do not have many repeat customers because roofs do not need frequent repairs, so this suit and the two previous suits against individual former Corp A employees were filed to harass Corp B, to occupy its time and resources, and to put it out of business so that Corp A could expand without competition from Corp B. Corp A's opening of a new location in Aurora in 2018, which is closer to Corp B, shows that Corp A is looking to expand toward Corp B and the Employment Agreement provisions preventing former Corp A employees from taking roofing jobs with former, *current*, or *prospective* clients shows that Corp A is trying to eliminate competition and unreasonably restrict trade.

WHEREFORE, the Defendant, Corporation B, Inc., respectfully requests that the Court dismiss the Plaintiff's Complaint at Law, with prejudice, and enter an award for attorneys' fees for the amounts expended in bringing this motion and for any other such relief that this Court deems equitable and just.

Applicant Details

First Name	**Kiera**
Middle Initial	**A**
Last Name	**Callahan**
Citizenship Status	**U. S. Citizen**
Email Address	**kac6zk@virginia.edu**
Address	**Address** Street **420 Ruskin Drive, Apt 206** City **Charlottesville** State/Territory **Virginia** Zip **22901** Country **United States**
Contact Phone Number	**9496160218**

Applicant Education

BA/BS From	**University of California-Irvine**
Date of BA/BS	**June 2019**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 23, 2022**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Riley, Margaret
mimiriley@law.virginia.edu
(434) 924-4671

Lieberman, Michaela
Michaela@justice4all.org
2404470896

Shepherd, Lois
lshepherd@law.virginia.edu
434-924-7049

Kim, Annie
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434-284-1214

References

Rachel McFarland
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rmcfarland@justice4all.org

Michaela Lieberman
(434) 529 - 1839
Michaela@justice4all.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Kiera Callahan
420 Ruskin Drive, Apt 206
Charlottesville, Virginia 22901
Kac6zk@virginia.edu | (949) 616 - 0218

June 14, 2021

The Honorable Elizabeth W. Hanes
U.S. District Court, E.D. Va.

Dear Judge Hanes:

I am a rising third-year law student at the University of Virginia School of Law, and I am writing to you to apply for a clerkship in your chambers. I expect to receive my J.D. in May 2022 and will be available to work any time after that.

My desire to become a lawyer and fierce advocate stems from the health challenges that I have faced throughout my life. When I was 17, I developed increasingly debilitating symptoms of a rare endocrine condition caused by small tumors in my pituitary gland. For several years, I battled with doctors to receive treatment and the brain surgery that I desperately needed. Each step of the way, I was doubted, dismissed, and disregarded. Once I was able to enter recovery, I made a commitment to represent those, who like myself, lacked a voice. Today, I live with the results of the surgery that saved my life and manage multiple chronic illnesses due to an unrelated genetic condition.

My disabilities and my experiences have shaped the person I am and the lawyer that I will become. While in law school, I have taken courses in health law, criminal justice, negotiation, and public service. In addition, I am the president of Advocates for Disability Rights at UVA Law, where we work to increase representation and awareness of disability within the larger student body. Because of my health needs and professional interests, I intend to practice law in the Virginia and Washington, D.C. area upon graduating, and am therefore only applying for clerkships in Virginia and D.C.

Enclosed please find a copy of my resume and my most recent transcript. I have also enclosed as a writing sample a portion of a paper that I wrote for Professor Shepherd's Bioethics class. Finally, included are letters of recommendation from Dean Annie Kim (434-243-4318), Professor Margaret Riley (434-924-4671), Professor Lois Shepherd (434-924-7409), and Michaela Lieberman (434-529-1839).

If you have any questions or need to contact me for any reason, please feel free to reach me at the above address and telephone number. Thank you very much for considering me.

Sincerely,

Kiera Callahan

Kiera A. Callahan

420 Ruskin Drive Apt #206 Charlottesville, VA 22901 • (949) 616 - 0218 • kac6zk@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., May 2022

- Advocates for Disability Rights, President
- Law and Public Service Program, Fellow
- Student Bar Association, Transparency Committee Member

University of California, Irvine, CA
B.A., *summa cum laude*, Anthropology (Certificate in Medical Anthropology), June 2019

- Social Sciences Dean's Ambassadors Council, 2018-2019 Ambassador of the Year
- English Conversation Program, 2018-2019 Facilitator of the Year
- Anthropology Outstanding Undergraduate Award, 2018-2019
- Tau Sigma National Transfers Honors Society

EXPERIENCE

Department of Justice, Civil Rights Division, Disability Rights Section, Washington, D.C.
Summer Intern, June 2021 – August 2021

Legal Aid Justice Center, Charlottesville, VA
Economic Justice Program Summer Intern, May 2020 – July 2020

- Researched legal issues surrounding COVID-19, and collected declarations in a statewide push for better COVID-19 protections in General District Courts.
- Assisted in brief writing and editing for a housing client experiencing domestic violence whose housing voucher was revoked.
- Successfully advocated for a disabled SSDI client whose lottery winnings had been garnished by the UVA healthcare system.

Orange County Health Care Agency Emergency Management, Santa Ana, CA
Public Health Preparedness Assistant/Intern, November 2017 – June 2018

- Educated medical practitioners and management in the local healthcare system regarding state and federal emergency management regulations and compliance.
- Planned county-wide exercises that tested local and state health agencies and assisted in auditing after-action reports.
- Identified the health needs of the public during disasters, and worked with Emergency Preparedness planners to address future requirements.

INTERESTS

Public speaking (professionally trained actor and vocalist); cooking Asian cuisines

Kiera A. Callahan

06/09/2021

Beginning of Law Record

2019 Fall

School:		School of Law		
Major:		Law		
LAW	6000	Civil Procedure	B+	4.0
LAW	6002	Contracts	B+	4.0
LAW	6003	Criminal Law	B	3.0
LAW	6004	Legal Research and Writing I	S	1.0
LAW	6007	Torts	B+	4.0

2020 January

School:		School of Law		
Major:		Law		
LAW	7727	Law/Psch of Dispute Res (SC)	A-	1.0

2020 Spring

School:		School of Law		
Major:		Law		
LAW	6001	Constitutional Law	CR	4.0
LAW	6005	Lgl Research & Writing II (YR)	S	2.0
LAW	6006	Property	CR	4.0
LAW	6104	Evidence	CR	4.0
LAW	7786	Topics in Law, Med & Soc (SC)	CR	1.0

2020 Fall

School:		School of Law		
Major:		Law		
LAW	6103	Corporations	B+	4.0
LAW	7085	Social Science in Law	A	3.0
LAW	7098	Public Interest Law & Advocacy	B+	2.0
LAW	9089	Seminar in Ethical Values (YR)	YR	0.0
LAW	9232	Bioethics and the Law Seminar	B+	3.0

2021 January

School:		School of Law		
Major:		Law		
LAW	7788	Science and the Courts (SC)	B+	1.0

2021 Spring

School:		School of Law		
Major:		Law		
LAW	7009	Criminal Procedure Survey	A-	4.0
LAW	7017	Con Law II: Religious Liberty	B	3.0
LAW	7080	Health Law Survey	B+	3.0
LAW	7088	Law and Public Service	B+	3.0
LAW	9090	Seminar in Ethical Values (YR)	CR	1.0

End of Law School Record

UNIVERSITY REGISTRAR — UNIVERSITY OF CALIFORNIA, IRVINE

SOCIAL SECURITY NO.	STUDENT NO.	NAME OF STUDENT	
XXX-XX-4088	10315-185	CALLAHAN,KIERA ANNE	
DATE ADMITTED	**DATE OF BIRTH**	**ACADEMIC CAREER**	**MAJOR PROGRAM**
SEP 2017	08/04/XX	UNDERGRADUATE 06/28/19	ANTHROPOLOGY 07/29/19

SECONDARY SCHOOL -- DATE GRADUATED --
CALIF VIRTUAL ACAD SAN DI JUN 2013

UNIVERSITY REQUIREMENTS -
09/17 UC ENTRY LVL WR REQT REQT SATISFIED
09/17 AMERICAN HISTORY REQT SATISFIED
09/17 AMERICAN INSTITUTION REQT SATISFIED

DEGREES -
BA ANTHROPOLOGY
JUNE 14, 2019

AP ENGLISH LANG 05-12
SADDLEBACK COL 7 TRM TO 08-16
IRVINE VLY COL 3 TRM TO 06-17
TOTAL 93.5*

FALL QUARTER 2017 -- DEANS HONOR LIST

PROBABILITY & STATS	ANTHRO	10A	4.0	A	16.0
DISEASE HLTH&INEQUL	ANTHRO	139	4.0	A	16.0
COMP RES IN SOC SCI	SOC SCI	3A	4.0	A+	16.0

WINTER QUARTER 2018 -- DEANS HONOR LIST

PROBABILITY & STATS	ANTHRO	10B	4.0	A+	16.0
EGYPTOMANIA	ANTHRO	169	4.0	A+	16.0
PROFESSIONAL INTERN	SOC SCI	197	4.0	P	P/NP

SPRING QUARTER 2018 -- DEANS HONOR LIST

PROBABILITY & STATS	ANTHRO	10C	4.0	A+	16.0
SUPERNAT FOLKLORES	ANTHRO	129	4.0	A+	16.0
LANG &SOC COGNITION	ANTHRO	150A	4.0	A+	16.0
PROFESSIONAL INTERN	SOC SCI	197	4.0	P	P/NP

SADDLEBACK COL 2 TRM TO 08-18
TOTAL 9.0*

FALL QUARTER 2018 -- DEANS HONOR LIST

MEDICAL ANTHRO	ANTHRO	134A	4.0	A+	16.0
FRINGE ARCHAEOLOGY	ANTHRO	139	4.0	A	16.0
UFOS IN AMERICA	ANTHRO	169	4.0	A+	16.0
STUDT PARTICIPATION	UNI AFF	1A	1.3	P	P/NP

WINTER QUARTER 2019 -- DEANS HONOR LIST

GLOB ISS ANTH PERSP	ANTHRO	30A	4.0	A+	16.0
RACE GENDER&SCIENCE	ANTHRO	128B	4.0	A+	16.0
WRITING SCIENCES	ANTHRO	180AW	4.0	A+	16.0

SPRING QUARTER 2019 -- DEANS HONOR LIST

SCI, CULTURE, POWER	ANTHRO	45A	4.0	A+	16.0
CULTURES OF BIOMED	ANTHRO	134B	4.0	A+	16.0
AMERICAN POP CULTUR	SOC SCI	189	4.0	A+	16.0
STUDT PARTICIPATION	UNI AFF	1C	1.3	P	P/NP

68.0* ATTM 68.0* PSSD 272.0* G.P. 136.0 BAL

QUARTER CREDITS COMPLETED 181.1 UC GPA 4.000

OFFICIAL UC IRVINE TRANSCRIPT COMPUTER-PRODUCED ON 07/29/19

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This academic transcript is printed on special security paper with a blue background, the Seal of the University of California Irvine, and the signature of the University Registrar. This is an official sealed instrument; a raised seal is not required.

Elizabeth Bennett, University Registrar

Patent #5,636,874

TouchSafe®

KIERA ANNE CALLAHAN
420 RUSKIN DR APT 206
CHARLOTTESVILLE, VA 22901-3234

Transcripts for: CALLAHAN,KIERA ANNE

EXPLANATORY LEGEND AND AUTHENTICITY CONFIRMATION INFORMATION ON REVERSE

UNIVERSITY OF CALIFORNIA IRVINE

TOUCH OR BREATHE ON TOUCHSAFE® FINGERPRINT TO VALIDATE AUTHENTICITY OF TRANSCRIPT

University Registrar
215 Aldrich Hall

www.reg.uci.edu
(949) 824-6124

University of California
Irvine, California
92697-4975

The University of California, Irvine, opened in September 1965 operating on the quarter system. Each quarter has ten weeks of instruction. The average student course enrollment is four courses (16 units). Minimum full-time enrollment is 12 units. The A+ grade was introduced fall quarter 1989; all other plus and minus grades were introduced fall quarter 1973.

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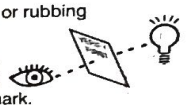

GRADING

Letter Grade:	Grade points: (per unit)	Credit allowed: Attempted	Passed	Grade points	
A +, A, A- ...excellent	4.0, 4.0, 3.7	Yes	Yes	Yes	
B +, B, B- ...good	3.3, 3.0, 2.7	Yes	Yes	Yes	
C +, C, C- ...average	2.3, 2.0, 1.7	Yes	Yes	Yes	
D +, D, D- ...barely passing	1.3, 1.0, 0.7	Yes	Yes	Yes	
F ...failure	0	Yes	No	No	
I ...incomplete	0	Yes	No	Yes	Prior to fall 1968
	0	No	No	No	Beginning fall 1968
IP ...in progress	0	No	No	No	Certain sequential courses for which the final grade is assigned to previous quarter(s) of the sequence.
NP ...not pass	0	No	No	No	Equal to grade C- or below. (Undergraduates)
NR ...no report	0	No	No	No	No grade submitted by instructor or an unresolved discrepancy in course enrollment.
P ...pass	0	No	Yes	No	Equal to grade C or better. (Undergraduates)
S ...satisfactory	0	No	Yes	No	Equal to grade B or better. (Graduates)
U ...unsatisfactory	0	No	No	No	Equal to B- or below. (Graduates)
UR ...unauthorized repeat	0	No	No	No	No credit.
W ...withdrew	0	No	No	No	Course dropped after sixth week of instruction.
Course Credit Codes:					
G0	*	Yes	Yes	Yes	Repeat of F or NP for letter grade.
G1	*	Yes	No	Yes	Repeat of C-, D+, D, or D-; units taken from original enrollment.
G2	*	Yes	Yes	Yes	Satisfaction of incomplete grade.
G5	0	No	No	No	Effective fall of 1984, repeat of C or better; prior to fall of 1984, repeat of C- or better; no credit.
GP	0	No	No	No	Repeat of course taken pass/not pass or satisfactory/unsatisfactory; no credit.
GW	0	No	No	No	Repeat of a workload credit only course.
I	0	Yes	No	Yes	Original grade was I which converted to F, NP or U after deadline to rectify passed.
IP	0	Yes	No	Yes	Original grade was IP which converted to an I after deadline to rectify passed.
K1	*	Yes	Yes	Yes	Credit by exam.
L6	0	No	No	No	Repeat of advanced standing or high school course; no credit.
M1	0	No	No	No	No credit for work while under dismissal.
M2	*	Yes	Yes	Yes	Credit for work while under dismissal.
M4	0	No	No	No	No credit for work after graduation.
NR	0	Yes	No	Yes	Original grade was NR which converted to F, NP or U after deadline to rectify passed.
PG	0	No	Yes	No	Repeat of NP or U.
PN	0	No	Yes	No	Course taken pass/not pass.
RC	0	No	Yes	No	Course has been repeated; original grade B-, C+, C or C-; graduate student only.
RD	0	No	Yes	No	Course has been repeated; effective fall 1984, original grade C-, D+, D or D-; prior to fall 1984, original grade D+, D or D-.
RF	0	No	No	No	Course has been repeated; original grade F.
RR	0	No	No	No	Course repeated more than once.
RW	0	No	No	No	Workload credit only course has been repeated.
SU	0	No	Yes	No	Course taken satisfactory/unsatisfactory.
WC	0	No	No	No	Workload credit only; does not apply toward graduation.
##					See memoranda section of transcript.

* Grade points reflect grade received.

COURSE NUMBERING

1 - 99	Lower division courses	300 - 399	Professional courses for teachers
100 - 199	Upper division courses	400 & above	Other professional and graduate courses
200 - 299	Graduate courses		

SCHOLASTIC NOTATIONS

Effective spring quarter 1969, the Irvine campus deleted all scholastic notations from students' official records. Beginning fall quarter 1979 "Academic Disqualification" or "Dismissed" has been noted on appropriate student records.
The notation "Deans Honor List" was introduced spring quarter 1972 for undergraduate students who complete 12 or more graded units in a quarter with a GPA of 3.500 or better.
Beginning winter quarter 1970, courses completed by "Limited" status students were at the post baccalaureate level.
An I grade (Incomplete) assigned fall 2010 and after will convert to an F, NP, U, as appropriate, when coursework is not satisfactorily made up by the stude

PROBATION

Undergraduate students are normally subject to academic probation if at the end of any quarter their grade point average for that quarter, or their cumulative University of California grade point average, is less than 2.0.

ACCREDITATION

Western Association of Schools and Colleges.

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: Clerkship Letter of Recommendation for Kiera Callahan

Dear Judge Hanes:

I am writing in support of the application of Kiera Callahan, a rising third-year student at the University of Virginia School of Law, for a position as a law clerk with your court following her graduation in 2022. I have known Kiera both as a mentee and as a student and I recommend her highly.

I first got to know Kiera this year as my mentee in the Law School's public service program. Of course, because of the pandemic, all our meetings were virtual, but Kiera is so personable that it honestly doesn't feel like it has not been an in-person relationship. We have met at least monthly and more often recently because she was a student in my Health Law Survey class. This has given me a good window on Kiera's abilities and her goals. She has an unwavering commitment to public service and avails herself of all opportunities to build her knowledge and capacities to those ends. Her work this summer with the Department of Justice working on disability rights will help her hone her skills. A clerkship is the natural extension of the experience that she has sought through law school and her summer internships.

This past semester, Kiera took my "Health Law Survey" class. It can be a difficult class because it moves very quickly and demands a good understanding of much of the law school curriculum. It involves insurance law, torts law, corporate law, tax law, administrative law, federal courts, antitrust and much more. Kiera participated by zoom but never failed to be well prepared and perceptive. Her frequent class participation revealed her maturing analytic abilities and her intellectual resiliency. She did very well on the exam, a very strong B+--but I think her actual understanding of the material exceeds her grade. I think she is not a natural at taking law school exams. While she sees all the angles, she doesn't always write them down on the paper. On the policy part of the exam, however, Kiera showed what I knew she is capable of doing. I had asked the students to choose a statute that we had studied during the semester and to consider how to amend it to address health disparities that have been revealed and exacerbated by COVID. Kiera's examination of Medicaid was both creative and thorough. I actually think if her recommendations were implemented, it would make a significant difference. That response was one of the three best answers in a very talented class.

I have truly enjoyed getting to know Kiera. She is naturally quiet, perhaps even shy, but manages still to be a leader. She is mature, well-organized, punctual and a real team player. I believe that all of these abilities will translate well to her future career. She possesses the intelligence, the skills and the personality to make a fine law clerk.

If you have any questions or would like to discuss Kiera's application, do not hesitate to call me at the telephone number listed above.

Sincerely,

Margaret Foster Riley

Margaret Riley - mimiriley@law.virginia.edu - (434) 924-4671

LEGAL AID
JUSTICE CENTER

Michaela Lieberman
Attorney

Dear Judge:

As an attorney at Legal Aid Justice Center and a clinical professor at the University of Virginia School of Law, I regularly supervise law students. Kiera Callahan is among the excellent students with whom I have had the pleasure of working. Kiera's work ethic, legal research and writing skills, and commitment to service made her a notable LAJC summer intern and such qualities will serve her well as a judicial clerk. Additionally, her kind spirit and deep sense of empathy will enhance the culture of any judicial chamber. I therefore enthusiastically endorse her judicial clerkship application.

Kiera exhibits a remarkable work ethic. Our office benefitted from her diligence throughout her tenure as an intern in the summer of 2020. I found myself particularly grateful for Kiera's hard work when I supervised her on a case involving an indigent client whose tax return had been garnished to offset his medical debt incurred at a local hospital. Kiera worked tirelessly to retrieve our client's tax return. She conducted exhaustive legal research on the Virginia Debt Collection Act and Virginia Debt Setoff Program. She ultimately formulated a creative argument challenging the sufficiency of the notice our client received from the hospital system. Her hard work paid off when, in response to her demand letter that outlined her well-honed legal arguments, the hospital system granted Kiera's request for a release of our client's earnings. Our client was overjoyed. My coworkers who also supervised Kiera's work consistently noted the meticulousness of Kiera's legal research and writing work product.

In addition to her work ethic and strong legal research and writing skills, Kiera displays a profound and genuine commitment to service. As an intern, Kiera always understood her individual cases within the greater context of systemic and historic inequality. She has used and continues to use her experience in law school to find opportunities to advocate for individuals in the disability community, both as the President of UVA's Advocates for Disability Rights and as a summer intern with the Department of Justice, Disability Rights Section. Kiera's empathic nature not only allowed her to connect with our clients, but also allows her to see legal issues from all sides – a critical skill for a judicial clerk.

Lastly, Kiera's kindness and positive attitude made working with her a delight. She worked very well with her peers and kept all of our spirits high as we navigated the challenges of working remotely during the pandemic. I am certain her warm, exuberant personality will enhance the culture of your chambers.

Thus, it is with enthusiasm that I recommend Kiera's judicial clerkship application. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Michaela Lieberman

1000 Preston Avenue, Suite A, Charlottesville, VA 22903 | **www.justice4all.org**
Phone: 434-529-1839| Fax: 434-977-0558 | Toll-free 800-763-7323 | email: michaela@justice4all,org

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Recommendation for Kiera Callahan

Dear Judge Hanes:

It is a pleasure to write this highly positive letter for Kiera Callahan, a third-year law student at the University of Virginia School of Law. Ms. Callahan is hard-working, insightful, collegial, and dedicated. She is an excellent student with a very positive and professional work ethic, and she would make an excellent clerk.

Ms. Callahan has taken three courses with me, so I know her work well: a short course, Topics in Law, Medicine, and Society; a seminar in Bioethics and the Law, which required a long research paper; and an interdisciplinary Seminar in Ethical Values (with law and medical students). In each of these seminars, students are encouraged to combine theoretical knowledge and practice and to participate in class discussions. Since the first day I met Ms. Callahan, I was highly impressed by her performance in class, her analytical abilities, and her collaborative personality. She listens carefully to others.

Ms. Callahan's passion for the just inclusion of all people in the opportunities and benefits of civil society was evident in her essays and other written assignments as well as class discussion. For the seminar Bioethics and the Law, Ms. Callahan wrote a lengthy research paper on chronic illness as an often-overlooked disability protected under the Americans with Disabilities Act. The paper included perceptive analysis, and I learned a lot reading it. Her course grade was a B+, the mean under UVA's very strict curve, which applies to seminars as well as large lecture classes. We spoke about her revising the paper for potential submission to law reviews, as it would make important contributions to the literature on chronic illness, disability, and law.

The biggest standout quality for me was Ms. Callahan's exceptional participation in class discussion in all classes. She is one of those students who is the "glue" that holds a class together as a community, and I imagine her performing that role well in any working environment. She has a bright personality that is supportive of and interested in others' experiences and ideas.

In sum, Ms. Callahan is an energetic and passionate thinker and doer. Through her undergraduate (major: anthropology) and legal coursework, work at the Legal Aid Justice Center and Orange County Health Care Agency for emergency management, and her extra-curricular and volunteer activities with the Student Bar Association and Advocates for Disability Rights, she has pursued diverse and challenging opportunities to prepare herself to contribute in meaningful ways to the legal world and beyond.

More generally, I think you will find Ms. Callahan to be likeable and pleasant as well as a person of integrity. I hope you will give Ms. Callahan strong consideration. She has great potential as a future advocate and lawyer.

Sincerely,

Lois Shepherd

Professor Lois Shepherd
Wallenborn Professor of Biomedical Ethics
Professor of Law and Public Health Sciences
University of Virginia
lls4b@virginia.edu

UNIVERSITY of VIRGINIA
SCHOOL of LAW

Annie Kim '99

ASSISTANT DEAN FOR PUBLIC SERVICE
DIRECTOR, PROGRAM IN LAW AND PUBLIC SERVICE
DIRECTOR, MORTIMER CAPLIN PUBLIC SERVICE CENTER

June 11, 2021

Letter of Recommendation for Kiera Callahan '22

Dear Honorable Member of the Judiciary:

I am delighted to provide this letter of recommendation for Kiera Callahan, a rising third-year student at the University of Virginia School of Law. Among the hundreds of students I have taught and advised over the past ten years, Kiera stands out as the one who has demonstrated the strongest character in the face of the greatest personal adversity. Her joyful nature, indomitable work ethic, and intellectual enthusiasm will make her an outstanding law clerk and colleague in your chambers.

Kiera was diagnosed in college with a rare pituitary gland disease that required multiple surgeries to remove her brain tumors. During her first semester of law school, Kiera began experiencing a host of puzzling and serious symptoms. Over the next three semesters, Kiera juggled medical tests and interventions, on the one hand, with law school studies on the other—all while enduring periods of pain, limited mobility, and exhaustion. It is a testament to Kiera's work ethic and meticulous planning that she succeeded in her studies despite these challenges. As she has shared with me, she works hard to stay ahead in her readings so that she will not fall behind if she suffers a health flare-up. It is a further testament to her character that I have never heard Kiera complain about her conditions. Indeed, Kiera may be the most positive student I have ever known. She regularly expresses gratitude for all the privileges she enjoys—a supportive family, teachers and friends, a service dog named Bonnie. And, thankfully, it appears that Kiera's new diagnosis and medical regimen will allow her to concentrate more fully on academics during her last year of law school.

As Assistant Dean for Public Service and Director of UVA Law's curricular Program in Law and Public Service, I have come to know Kiera well. I taught her in two classes: a small public interest lawyering skills class in the fall of 2020, and a survey course for aspiring public service attorneys in the spring of 2021. Although she received a median grade for both—a B+—I do not think this reflects her full intellectual or academic potential. I believe that Kiera will continue to make large gains as she maintains her newly improved level of health.

Nonetheless, in both of my classes, Kiera proved to be bright, deeply engaged, and highly productive. Despite her medical conditions, she came to each class fully prepared, enthusiastic, and ready to discuss the issues with

580 Massie Road, Charlottesville, VA 22903-1738 | P 434.243.4318 | F 434.924.3945 | E akim@law.virginia.edu
www.law.virginia.edu

insight. She is equally interested in civil rights issues and health law, the intricacies of EPA environmental regulation and the theories behind community bail funds. Her excitement to learn new areas of the law make her well-suited for a judicial clerkship. In my skills course last fall (Public Interest Law and Advocacy Skills), Kiera produced one of the strongest written assignments in the class. This exercise required students to propose policy changes to a university regarding its Title IX compliance. Kiera balanced her arguments as a strong advocate with astute and pragmatic insight into an institution's operational concerns. This is characteristic of her keen ability to understand both sides of a legal or policy issue. Kiera also performed with poise and confidence in her two oral communication assignments last fall—a recorded client interview and a live educational workshop. She has the ability to put people at ease and gain their trust through her friendly, professional demeanor. These skills, too, will serve her well as a clerk when communicating with litigants and other court personnel.

Having advised Kiera on her papers for both my classes, I can also attest to her diligence as a writer and editor. She is quick to incorporate feedback. She has no ego regarding her work. More than once she has told me how much she values developing her research and writing skills. As a clerk, then, I know she will take great pains to elicit and incorporate feedback from her judge. She will be a pleasure to mentor.

Finally, I would be remiss if I did not share a few broader observations about Kiera. In addition to being a successful law student, Kiera has taken an important leadership role at the school, serving as president of Advocates for Disability Rights. She also gained admission to the selective curricular program I direct, the Program in Law and Public Service, and is active in the wider public service community. These actions confirm what I have known to be her mission since the start of law school: serving others as a public service attorney. Kiera relished the opportunity last summer to advocate for indigent clients at the Legal Aid Justice Center and plans to broaden her public service experience this summer through her internship at the Department of Justice's Civil Rights Division and through future clinics. Whether Kiera ultimately begins her career as a disability rights advocate or as an attorney at the U.S. Department of Justice, I am confident that she will end it with a record of distinguished public service.

I hope this letter has been helpful for your evaluation of Kiera's candidacy. I would be very glad to provide any additional information that you might need for this truly deserving student. Thank you very much for your consideration.

Sincerely,

Annie Kim

Chronic Illness and Employment: How Legal Misunderstanding Leads to Societal Barriers

by Kiera Callahan

Abstract: Chronic illness impacts thousands of Americans and is the leading of cause of disability in the United States. Yet, societal understandings of how chronic illness fits into disability are limited. Perspectives on disability have changed over the years to more accurately capture this unique minority group, but many still struggle to find representation. Although legal protections are available, it is difficult for those with disabling chronic illness to acquire and maintain stable employment. While some of this instability is due to the ever-changing nature of chronic illness, much of it revolves around employer misunderstanding of the Americans with Disabilities Act and how to best create a diverse workforce. Through greater research and education, societal improvements can be made to more fully integrate disabled Americans into the workplace, but we must be willing to take the first steps.

IV. Battle for Accessibility

As evidenced in the previous section, there is a tremendous push and pull in the enforcement of the ADA and this tension only becomes greater for those with invisible disabilities who do not appear traditionally "disabled." Stereotypes around disabilities have existed for years and most people associate being disabled, or perhaps the less-preferred "handicapped", with those that have physical disabilities such as missing limbs or a spinal injury.[1] However, invisible disabilities or disabilities that are not apparent to the general public make-up the largest subsection of the disabled community.[2] Invisible disabilities are unique in that they usually involve a chronic illness with a spectrum like effect on the person diagnosed. One day someone with an invisible disability may function closely to that of an able-bodied person and the next they may be completely bed-bound, dependent on the help of others. This variance in function among the invisibly disabled largely clashes with society's viewpoint of what disability looks and acts like. Hence, the importance of embracing a societal model of disability, such as Susan Wendall's healthy vs. unhealthy model, that reflects the unpredictable nature of disabling chronic illness.

There is no doubt that invisible disabilities are covered by the ADA, as referenced in the very definition of disability that the ADA provides in Title III §36.105, but questions remain as to how this coverage applies to places like the workplace.[3] A legal misunderstanding is present

[1] See Arika Okrent, *Why Did 'Disabled" Replace 'Handicapped' As the Preferred Term?,* Mental Floss (Nov. 3, 2015), https://www.mentalfloss.com/article/69361/why-did-disabled-replace-handicapped-preferred-term. Though the myths around the origin of the word handicap have been busted, it has been replaced by terms like disability or disabled in most areas of the community. There has been a large discussion recently around what kind of language is appropriate and preferred by those with disabilities, like person vs. disability first language, it is unanimous that terms such as "special needs" or "differently abled" are not preferred and oftentimes offensive. See Rebecca Cokley, *Why "Special Needs" is Not Helpful,* Rebecca Cokley Medium.com (Feb. 28, 2020), https://medium.com/@rebecca.cokley.

[2] Mitchell, *supra.*

[3] 28 CFR Part 36 § 36.105 (Jan. 17, 2017).

when it comes to how reasonable accommodation under the ADA operates. While the Americans with Disabilities Act undoubtably covers disabling chronic illness, it was not necessarily created to craft a world for such illnesses. In the article *The "Presence is an Essential Function" Myth*, Smith highlights the difficulty that employers and the courts face when determining what level of accommodation for disabled, chronically ill employees is reasonable without more guidance from the government. She states that "Although employers clearly have an interest in having productive employees, the plain language of the ADA requires employers to modify policies based on able-bodied norms to accommodate the disabled."[4] Therefore, rather than spend time and resources developing accommodations for disabled employees, businesses have the perspective that they would rather not stray into potentially legal territory at all. As a result, they choose not to hire disabled employees. This is particularly unfortunate because most accommodations that are requested under the Americans with Disabilities Act are not costly or difficult requests – they are basic and consist of things like allowing the use of a service animal or telecommuting.[5]

In no greater place does this legal misunderstanding surrounding accommodation occur than in attendance policies at the workplace. Because disabling chronic illness varies so widely in terms of everyday functioning, attendance in employment is often impacted, which makes it

[4] Smith, *supra*, at 185.
[5] T.R. Goldman, *Working With A Chronic Disease*, 36 Health Affairs 202, 203 (Feb. 2017), doi: 10.1377/hlthaff.2016.1622. This article educates on two-levels: it presents the reader with a picture of what working with a chronic illness is like and helps employers understand what is expected from them under ADA law. In addition, it presents advice on how to better accommodate employees with chronic disease and utilize this capable, passionate workforce. It is worth mentioning that while this article overall presents a positive view of chronically ill employees, it still features some harmful narratives like the advice featured from Bob Carolla, a lawyer who suffers from chronic depression. He mentions that workers should not disclose their disability until they have been hired and are comfortable within their new job, preferably 3-6 months out. *Id.* at 205. For many chronically ill and disabled employees, this is not possible as they need their accommodations immediately. As a result, disabled chronically ill employees are stuck between a rock and a hard place – either struggle with their job in the first few months as a result of a lack of needed accommodations or disclose too early and potentially lose their job.

difficult for those with disabling chronic illness to maintain a financially stable job. Flexible leave policies are critically important for including disabled employees in the workplace, but there is a legal and societal misconception that, in order to work, one must attend an office every day and work the typical 9-5. [6] As a result, when disabled employees ask for a flexible attendance policy, it can often be turned down even though they would still be working the same hours at home. Because of this focus on presence in the workplace, disabled employees can be overlooked in their reasonable accommodation for flexible attendance. The employers respond that "presence is an essential function" of the job and if you cannot do that, then you are no longer qualified for the job in which you were hired. By doing so, employers give themselves an "out" to essentially legally discriminate. They can choose not to hire disabled workers, turn down accommodation requests for disabled employees, and fail to promote those who are disabled in the company. Smith notes that this harmful narrative around presence in the workplace is enforced by the courts who have continuously held that presence is an essential function of one's work.[7] Yet, in our increasingly virtual world, the age of traditional workplaces has become outdated. Moreover, recent studies indicate that productive work is more likely to happen at home than at the office.[8] Hopefully, businesses will adapt outdated, old policies to our ever-changing world as the nature of work continues to evolve.

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[6] See Audrey E. Smith, *The "Presence Is An Essential Function" Myth: The ADA's Trapdoor for the Chronically Ill*, 19 Seattle Univ. Law Rev. 163 (1995). Smith discusses the court precedent regarding flexible leave and the barriers that past opinions have created when disabled employees request flexible leave as part of reasonable accommodation. The court has historically taken the position that in order to be a "qualified individual" for an employment position, one must be able to work the typical hours. However, Smith breaks down this myth to illustrate that qualification for specific employment does not depend on the hours one works, but the experience one has.

[7] Smith, *supra*, at 172.

[8] See BBC Sounds, *Curing Our Positivity Problems*, BBC (June 30, 2020), https://www.bbc.com/worklife/article/20200710-the-remote-work-experiment-that-made-staff-more-productive. The 2013 study mentioned in this article notes that there was a 13% increase in productivity when workers conducted their day at home versus at the office. Though there are some potential external validity issues with the study, others have noted similar increases in productivity with the COVID-19 pandemic forcing workers to transition to home-based environments. See also Scott Mautz, *A 2-Year Stanford Study Shows the Astonishing Productivity Boost of*

Furthermore, when it comes to employment, there is a culture of perpetual doubt encapsulating employees with disabling chronic illness. They fear taking a job without the necessary accommodations but, at the same time, are worried about disclosing their disability and being discriminated or looked down upon because of it. As a result, disabled employees are often stuck between a rock and a hard place. Interestingly, this feeling among the disabled and chronically ill is not unique to American job places. A recent study done in Sweden by Maria Norstedt captures the tension between economic stability and disability.[9] Norstedt focuses her study on the concerns about disclosure and distrust that employees with invisible disabilities face. Disabled employees feel a sense of stigmatization, their disability setting them apart from everyone else and affecting their work capacity.[10] Employers in the study mention that they want their employees to disclose their invisible disabilities in order to best aid them, yet they also encouraged disabled employees to stay "realistic" with their goals and left them unsupported when navigating difficult work situations that arise as a result of their disability. One employer going so far to say that those with invisible disabilities have a "moral obligation" to disclose their disability if it has the potential to affect the job they are in, such as a teacher with epilepsy.[11] This attitude creates a confusing environment for disabled employees who want to be financially secure and independent, yet are being bombarded by messaging that they shouldn't reach for goals that are too lofty. The world and all its potential is never opened up fully to disabled people who are asked to exist, but not to thrive.

Working From Home, Inc. (Apr. 2, 2018), https://www.inc.com/scott-mautz/a-2-year-stanford-study-shows-astonishing-productivity-boost-of-working-from-home.html.

[9] Maria Norstedt, *Work and Invisible Disabilities: Practices, Experiences, and Understandings of (Non)Disclosure*, 21 Scandinavian J.of Disa. Research 14 (2019), doi: https://doi.org/10.16993/sjdr.550.

[10] Norstedt, *supra*, at 19.

[11] Norstedt, *supra*, at 19.

Conflicting messaging from leadership is not the only obstacle for those with invisible disabilities when it comes to disclosure in the workplace. The Sweden study also details how those with invisible disabilities feel scrutinized in their illness by their co-workers when they disclose. Illnesses are judged according to validity with debilitating forms of psychological disabilities, IBS, fibromyalgia, and chronic fatigue syndrome being looked down upon, "[w]hether or not a disability has a valid diagnostic label can influence not only disclosure, but also how disclosure is dealt with by others."[12] Thus, disabled chronically ill employees are not only facing bias by workplace leadership, but also by their coworkers who may judge them according to the particular condition they have been diagnosed with. Through the continued endurance of this old, outdated medical model of looking at disability and illness, the cycle of distrust around disclosure continues and an atmosphere of diverse inclusion is never truly achieved. Whatever path the disabled and chronically ill choose, they face judgement and criticism.

In sum, there is a real struggle for independence that those with invisible disabling conditions face. They are often stuck in the middle in terms of their level of impairment where they need extra help and flexibility but are not completely limited in terms of their functioning or what they can do. Moreover, many illnesses follow a spectrum, as previously mentioned, where one day someone may be close to able-bodied and the next completely debilitated. Because of this conundrum, it can be hard for many in the disability community to find well-paying jobs. The reality for many is that despite laws that attempt to make these fields more accessible, inclusion is still lacking for a variety of disabled people. Discrimination remains and reasonable accommodations are not always met. The disability community forms a tremendous workforce

[12] Norstedt, *supra*, at 17.

of people who want to achieve high levels of education and employment, but have yet to be fully embraced. Once disability is seen as an advantage and not a liability, the world will up open more. However, steps need to be made to get to that point.

V. How We Can Do Better

Disability rights is an incredibly important area, yet it is sadly overlooked and undervalued, both legally and in greater society. Due to this continuous oversight, disability advocates have used the phrase "disability rights are human rights" to best explain the critical nature of inaccessibility and discrimination in our world.[13] If disabled people are denied access to buildings or not given reasonable accommodation, then they are eliminated from physically being able to complete that task and participate in society. This is a unique disadvantage that is especially particular to the disability community. Hence, the importance of meaningful research and education to help spread the message that disability rights are human rights.

Further research in the United States has to be conducted about the role that invisible disabilities play in the workplace and the attitudes that disabled employees encounter. The Sweden study noted earlier about disclosure and disability in employment is incredibly helpful in that it sheds light on the difficulties that those with chronic illness face in employment; however, the United States lacks similar research that reflects on our own societal workings. Although demographic information about disability and employment is helpful, we need to know more about what is actually happening in workplaces when it comes to chronically ill employees. Questions such as do employers feel properly educated about ADA law, what areas of the workforce are the invisibly disabled the most concentrated, do they feel supported in their jobs,

[13] *Disability Rights Are Human Rights*, 21 UN DESA Voice (Dec. 1, 2016), https://www.un.org/development/desa/undesavoice/feature/2016/12/30167.html.

have they disclosed their disability to their bosses, have they disclosed to their peers, and what are the challenges that they have encountered are critically important when it comes to moving the needle forward in accessibility and inclusion. Although some of these questions may be difficult to answer, it is vital that we make an effort to do so.

With this research, we can then identify the gaps in public knowledge so as to tailor and disseminate guidance to various businesses and employers about inclusivity in the workplace and the Americans with Disabilities Act. The Office of Disability Employment Policy at the U.S. Department of Labor has provided a selection of free online resources for companies to ensure disability awareness at the workplace, but these resources do not educate on the legal guidelines under the Americans for Disabilities Act when it comes to accommodating disabled employees.[14] While tolerance is extremely important when it comes to promoting a diverse workplace, this is one piece of the puzzle and disabled employees will not be able to join the workforce if they do not have the accommodations they need to be successful at their jobs. Though the U.S. Equal Employment Opportunity Commission has webpages discussing the employer's responsibilities under the ADA, greater clarity and widespread knowledge needs to be provided so that there is larger awareness surrounding legal protections for disabled employees and clear violations of the Americans with Disabilities Act in the workplace are eliminated.[15] There are private organizations that provide disability and inclusion training, but it is the government that should be making these same steps to protect the rights of the disabled community.[16]

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[14] *Ideas for Employers and Employees*, U.S. Department of Labor, https://www.dol.gov/agencies/odep/initiatives/ndeam/employers (last visited February 3, 2021).
[15] See *The ADA: Your Responsibilities As An Employer*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/publications/ada-your-responsibilities-employer (last visited February 3, 2020); *The ADA: Your Employment Rights As An Individual, U.S. Equal Employment Opportunity Commission*, https://www.eeoc.gov/laws/guidance/your-employment-rights-individual-disability (last visited February 3, 2021).
[16] Organizations such as the ADA National Network, https://adata.org/, have a wide-variety of resources online, but even they are limited in what they can do. Much like any other piece of legislation, the government needs to step forward and provide greater guidance to the industries that encounter ADA law routinely.

VI. Conclusion

To summarize, perspectives on disability have changed tremendously over the years from a model of exclusion and guilt to one focused on accessibility and autonomy. Moreover, the societal perspective of disability has evolved along with the disability community as it continues to fight and grow for civil rights. However, some of this improvement is lacking when it comes to the interpretation of the Americans with Disabilities Act and the transition of greater numbers of disabled people into areas like employment. Nevertheless, there is hope for the future with greater research and education efforts aimed at increasing levels of public understanding and support.

The disabled community has been largely left out of important conversations about marginalization, discrimination, diversity and inclusion in many areas of our society.[17] In many ways, the disabled community is the last minority to achieve public notoriety, yet it has the potential to make the most significant impact based on the size and intersectionality of the community alone. Accessibility for disability is accessibility for the world.[18] It is possible to get there with greater awareness and support. It just takes one step, or wheel, at a time.

[17] See Peter McDermott, *Expanding the Diversity Conversation: Don't Overlook People with Disabilities*, Minnesota Post (March 10, 2020), https://www.minnpost.com/community-voices/2020/03/expanding-the-diversity-and-inclusion-conversation-dont-overlook-people-with-disabilities/. See also Holly Kearl, *People With Disabilities Have Been Left Out of Conversations About Harassment*, Huffington Post (March 17, 2018), https://www.huffpost.com/entry/opinion-kearl-disability-assault_n_5aaabb9ae4b073bd82930210.

[18] Accessibility does not just help the disabled community, it has the power to help everyone, especially when it comes to adjusting to our new reality after COVID. See Neil Milliken, *How Accessible Technology Can Help in Our Rapidly Changing World*, ATOS (May 20, 2020), https://atos.net/en/blog/how-accessible-technology-can-help-in-our-rapidly-changing-world.

Applicant Details

First Name	**Cecilia**
Middle Initial	**Y**
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Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **107 Tempsford Lane** City **Richmond** State/Territory **Virginia** Zip **23226** Country **United States**
Contact Phone Number	**9562406366**

Applicant Education

BA/BS From	**University of Richmond**
Date of BA/BS	**May 2016**
JD/LLB From	**Villanova University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23906&yr=2010**
Date of JD/LLB	**May 14, 2021**
Class Rank	**20%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Villanova University Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Webb, Jessica
webb@law.villanova.edu

References

1) Kevin Steele, Montgomery County Pennsylvania - District Attorney, KSteele@montcopa.org, (610) 278-3099

2) Katherine Moore, Administrative Coordinator, Safe Harbor Shelter
katherine@safeharborshelter.com, (804) 249-9470

3) Jennifer Bowie, Associate Professor, University of Richmond
Jbowie@richmond.edu, (804) 822-0070

This applicant has certified that all data entered in this profile and any application documents are true and correct.

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August 31, 2020

The Honorable Elizabeth W. Hanes
United States District Court, Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr. U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, Virginia 23219

Dear Judge Hanes:

I am a rising third-year student at Villanova University Charles Widger School of Law writing to apply for the two-year term law clerk position beginning in August 2021. I am very interested in both civil rights and complex litigation. I believe clerking is the best way to learn about and be exposed to both.

Through my professional experiences, I have developed and honed skills which are indispensable for this position. I am currently serving as an intern to the Honorable Marjorie Rendell in the Third Circuit Court of Appeals. In this role, I work closely with Judge Rendell's term law clerks. I conduct legal research and prepare memoranda on unique legal issues before the Court. This past summer, I served as a faculty research assistant, developing a legal problem and hypothetical for the 61st Annual Theodore L. Reimel Competition, Villanova Law's intraschool moot court competition. This process included researching the viability of the proposed problem, examining states' relevant statutes and their legislative histories, evaluating applicable case law, and drafting the bench brief. Additionally, I externed with the Montgomery County, Pennsylvania District Attorney's Office Appeals Division. In that role, I researched pending cases, prepared memoranda on dispositive issues, and drafted briefs to be filed in the Superior Court of Pennsylvania.

In addition to my professional experiences, I am involved in the Villanova Law community. As a member of the Villanova Law Moot Court Board, I won the 60th Annual Theodore L. Reimel Competition, and I was awarded Best Final Round Oralist. This year, I will represent Villanova in an interschool moot court competition. Additionally, I serve as the Vice President for Villanova Law Students Against Sexual Violence and am a Villanova Law Student Ambassador. Not only do my professional and educational experiences make me an excellent fit for your chambers, but I am eager to move back to Richmond and have a career as an attorney in RVA.

Thank you for considering my application. I have enclosed reference letters from Professors Tammi Etheridge and Jessica Webb. I am happy to provide any additional information.

Respectfully,

Cecilia Carreras

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EDUCATION

Villanova University Charles Widger School of Law, Villanova, PA — Anticipated May 2021
J.D. Candidate, Litigation and Dispute Resolution Concentration
GPA: 3.56 (Rank: 28/171) (Top 20%)
Honors: Champion, 60th Annual Theodore L. Reimel Moot Court Competition
Best Final Round Oralist, 60th Annual Theodore L. Reimel Competition
Activities: Villanova Law Moot Court Board, Member
Villanova Law Students Against Sexual Violence, Vice President
Villanova Law Student Ambassador

University of Richmond, Richmond, VA — May 2016
B.A. in Criminal Justice
GPA: 3.00

EXPERIENCE

United States Court of Appeals for the Third Circuit — Philadelphia, PA
Judicial Extern for the Honorable Marjorie Rendell (Remote) — August 2020 – Present

- Conduct legal research and prepare memorandums to assist in determining whether a case requires oral argument

Montgomery County District Attorney's Office — Norristown, PA
Intern, Appeals Division (Remote) — June 2020 – August 2020

- Drafted appellate briefs to be filed with the Superior Court of Pennsylvania
- Participated in mock preliminary hearings and trials

Intern, District Attorney Kevin Steele and First ADA Edward McCann — May 2019 – August 2019

- Conducted legal research on narrow issues for upcoming criminal cases
- Organized file of 50+ boxes containing information including police statements, phone records, expert witnesses, prior bad acts witnesses, and related civil lawsuits.

Villanova University Charles Widger School of Law — Villanova, PA
Research Assistant to Professor Jessica Webb — May 2020 – July 2020

- Attended weekly Zoom meetings with Professor Webb and co-research assistant to discuss progress, concerns, and next steps
- Conducted legal research and drafted memoranda relating to viability and development of competition problem for 61st Annual Theodore L. Reimel Competition
- Drafted Bench Brief for 61st Annual Theodore L. Reimel Competition

Trial Advocacy Teaching Assistant for The Honorable Juan Sanchez — Sept. 2019 – December 2019

- Reviewed case files and acted as witness for direct and cross-examinations

Safe Harbor Shelter — Richmond, VA
Administrative Assistant — May 2018 – August 2018

- Prepared and organized audit materials for two grant programs provided by Virginia's Department of Criminal Justice Services to assess grant funding for following fiscal year
- Collaborated with staff members in developing Volunteer Policies and Procedures Handbook
- Acted as point-of-contact for volunteers and donors, ensuring volunteer opportunities were staffed and food pantry and gift-card bank were stocked for clients in need

Volunteer — January 2017 – May 2018

- Advocated for individuals seeking protective orders at local courthouse

Cecilia Carreras
Villanova University School of Law
Cumulative GPA: 3.56

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Analysis, Research, and Writing	Mitchell Nathanson	B+	2.50	
Civil Procedure	Ann Juliano	A	4.00	
Criminal Law	Steven Chanenson	B+	4.00	
Torts	Doris Brogan	B	4.00	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts	Michael Risch	A-	4.00	
Regulatory State	Tammi Etheridge	A-	3.00	
Constitutional Law I	Catherine Lanctot	B+	3.00	
Property	David Caudill	A	4.00	
Property (Practicum)	David Caudill	H	1.00	
Legal Analysis, Research, & Writing	Mitchell Nathanson	A-	2.50	
Professional Development	N/A	P	0.50	

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Summer Externship	Matthew McGovern	P	3.00	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Moot Court Board I	N/A	P	0.00	
Constitutional Law II	Catherine Lanctot	B+	3.00	
Legal Writing 3: Litigation	Jessica Webb	A	3.00	
Professional Development	N/A	P	0.50	
Legal Profession	Catherine Lanctot	A	3.00	
Evidence	David Caudill	B	4.00	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Moot Court Board I	N/A/	P	0.00	
Civil Rights Litigation: Enforcing the Constitution	Theresa Ravenell	P	0.00	
Employment Discrimination	Ann Juliano	P	0.00	

Professional Development II	N/A	P	0.00
Negotiation & Mediation Advocacy	Christine Mooney	P	0.00
Civil Pretrial Practice	Colleen Meehan	P	0.00

Due to COVID-19, all grades were pass/fail during Spring 2020.

Grading System Description

A, Excellent, 4.00
A-, 3.67
B+, Outstanding, 3.33
B, Very Good, 3.00
B-, 2.67
C+, Good, 2.33
C, Satisfactory, 2.00
C-, Marginally Unsatisfactory, 1.67
D, Unsatisfactory, 1.00
F, Failure, P, Pass assigned in Pass/Fail Course
H, Honors for JD Externship

VILLANOVA
UNIVERSITY

JESSICA K. WEBB
PROFESSOR OF LAW
CHARLES WIDGER SCHOOL *of* LAW

September 8, 2020

The Honorable Elizabeth W. Hanes
United States District Court
Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr. U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Cecilia Carreras

Dear Judge Hanes:

Please consider my strong recommendation of Cecilia Carreras, who has applied for a clerkship with you. Over the past two years I have had the pleasure of getting to know Cecilia quite well. I am her faculty advisor, and Cecilia was a student in my fall 2019 appellate advocacy course. Because Cecilia did outstanding work in my class, I was delighted when she agreed to be my research assistant this summer.

Appellate Advocacy is an advanced legal writing course for second-year law students who are particularly interested in litigation. Students who take the course during the fall semester participate in the Theodore L. Reimel Competition, which is an intra-school appellate advocacy tournament and a hallowed tradition at Villanova. As part of the course/Competition, the students work in teams to write an appellate brief, and they participate in oral arguments before panels comprised distinguished alumni, practitioners, and judges.

Cecilia's team advanced through four challenging rounds of competition to *win* the 60th Annual Reimel Competition. In addition, the judges gave Cecilia the award for Best Final Round Oralist. Those honors were well-deserved; I can say without reservation that Cecilia was one of my strongest students that semester, and her oral argument was among the best I have seen since I started administering the Competition in 2015. In addition, she demonstrated a talent for legal writing and researching that was exceptional for a second-year law student. Cecilia also consistently showed intellectual curiosity and a drive to excel. She was an active and valuable participant in class discussions, and her comments reliably exhibited a firm grasp of the material. Furthermore, when she was working on the culminating brief and oral argument, she was not satisfied to simply do what was required for the assignments; rather, she continually looked

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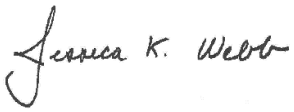
beneath the surface of the law and facts. Her commitment to the class and Competition was especially noteworthy because the problem pertained to a complex area of the law involving the Eighth Amendment rights of prisoners and the qualified immunity doctrine.

Furthermore, as Villanova Law's Moot Court Board's faculty advisor, I can attest that Cecilia is a valued member of the Board. She has also been an outstanding research assistant this summer. Her job entails a lot of responsibility, as she is helping me as I write the 2020 Reimel Competition problem and bench brief, which must be scrupulously accurate. Cecilia, however, has risen to the occasion; she is detail-oriented, precise, insightful, and creative in her thinking about complex issues. Moreover, I have been very impressed with her responsiveness, reliability, and enthusiasm for the law. In short, I feel fortunate to have Cecilia's help with these projects. Thus, should you decide to hire her, I am confident that you will be very pleased with your choice.

I would be happy to speak with you about Cecilia in more detail. Please do not hesitate to contact me if I can be of further assistance.

Respectfully,



Jessica K. Webb

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Background Information

The following writing sample is from the Villanova University Charles Widger School of Law 60th Annual Theodore L. Reimel Moot Court Competition. The case *Daniel Rowe*, Petitioner *v. Helen Meyer, Carl Walker, Daryl Pushkin, Sean Williams, Stacey Gray,* and *Marcus Washburn, in their individual and official capacities*, Respondents, was set before the United States Supreme Court on writ of certiorari from the Seventh Circuit Court of Appeals. The writing sample is in favor of Respondents, the prison officials. It has not been edited by a third-party.

The first issue (not reproduced) was whether the prison officials violated the inmate's Eighth Amendment rights. The second issue was whether the prison officials could be held liable for violating an inmate's right to outdoor exercise when the right was not clearly established under either *Anderson*'s "sufficiently clear" or *Hope*'s "fair warning" standards and prison officials provided the inmate with one-hour, five days per week of indoor, out-of-cell exercise?

The relevant factual background is as follows:

The prisoner, Daniel Rowe, was serving a life sentence for murder. Prior to his incarceration, he was the leader of a notoriously violent gang, Mafia Nation (MN). When prison officials received information that a gang war was brewing, they initiated a lockdown and searched the cells of those inmates believed to be affiliated with either MN or Devil Bros (DB). During the search of Rowe's cell, prison officials discovered a letter written by a former MN member and a list of addresses of known and suspected MN members. Around this time, an informant notified prison officials that DB had placed a hit on Rowe. (There was another inmate with the same last name and the record was silent as to measures taken to protect that individual.) The prison's Adjustment Committee charged Rowe with engaging in gang activity while in prison. Rowe pled not guilty but offered no evidence or third-party testimony to refute the charge. He was found guilty and transferred to Administrative Segregation (AS). While in AS, he was denied yard privileges as both punishment and protection. His AS cell measured eighty square feet.

The prison officials provided Rowe with access to an indoor recreation room measuring eighty square feet, containing a chin up bar, and two four-foot windows, allowing fresh air and sunlight through small holes in the protective grating. He had access to the room for one-hour, five-days per week and was given an in-cell exercise instruction pamphlet.

Rowe repeatedly challenged his stay in AS, but prison officials refused to release him without evidence that he was not affiliated with MN. He ultimately spent two years and two months in AS. He was eventually released back into the general population and had his yard privileges reinstated when the DB member who ordered a hit on him was transferred to another prison.

The relevant procedural background is as follows:

Rowe alleged that the denial of outdoor exercise for two and a half years constituted a violation of his Eighth Amendment right to be free from cruel and unusual punishment. The

District Court denied the prison officials' Motion for Summary Judgment as to qualified immunity, finding that the right to outdoor exercise was clearly established at the time of the alleged violation. The Seventh Circuit remanded the case with instructions to grant the Motion for Summary Judgment on the grounds that the prison officials *were* entitled to qualified immunity because competent officials could reasonably disagree about the constitutionality of denying an inmate outdoor exercise for two years and two months. On appeal, the prison officials requested that the Supreme Court affirm the Seventh Circuit's holding.

Summary of the Argument – on behalf of Respondents, the prison officials:

This case asks whether an inmate can claim that his Eighth Amendment right to be free from cruel and unusual punishment was violated when he was limited to indoor exercise for two years and two months when clearly established law at the time of the alleged violation was not "sufficiently clear" under *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) and did not provide "fair warning" under *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) that such a denial was unlawful. This Court should affirm the Seventh Circuit's grant of qualified immunity because the law at the time of the alleged violation as to outdoor exercise was not clearly established.

Respondents cannot be held liable under *Anderson*'s "sufficiently clear" standard. While the Supreme Court has never addressed the issue, Seventh Circuit precedent is "sufficiently clear" that an inmate need only be provided with a meaningful opportunity for exercise. In the instant case, Respondents provided Petitioner with one-hour, five-days per week of indoor, out-of-cell exercise. Further, Petitioner's cell had ample room for meaningful in-cell exercise. As such, Respondents could not have known their conduct was unlawful.

Even under the *Hope* "fair warning" standard, Respondents cannot be held liable because precedent from this Court and the federal circuits did not provide fair warning that their conduct was unlawful. Moreover, out-of-circuit jurisprudence would have also failed to provide Respondents with fair warning. At best, it would have informed Respondents that depriving Petitioner of outdoor exercise was permissible because Petitioner could exercise in-cell and had access to indoor, out-of-cell exercise. At worst, it would have informed Respondents that Petitioner was entitled to outdoor exercise – absent a penological justification. The unreproduced portion of the brief discussed the dual penological justifications which existed to justify the denial of outdoor exercise.

Under *Pearson v. Callahan*, 555 U.S. 223 (2009), even if the Respondents violated Petitioner's Eighth Amendment right to be free from cruel and unusual punishment, the law at the time of the alleged violation was not clearly established. Thus, this Court should hold that Respondents are entitled to qualified immunity.

Argument

I. EVEN IF PETITIONER'S EIGHTH AMENDMENT RIGHT WAS VIOLATED, RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY UNDER BOTH *ANDERSON* AND *HOPE*.

This Court should find that Respondents are entitled to qualified immunity because Petitioner's alleged right to outdoor exercise was not clearly established. Qualified immunity, an affirmative defense, shields "all [government officials] but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Thus, officials are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S 800, 818 (1982); *see Pearson v. Callahan* 555 U.S. 223, 227 (2009) (holding that a court may determine whether a right was clearly established without determining whether a constitutional violation occurred).

Whether a right was clearly established is based on available law at the time of the alleged violation and can be evaluated under two different standards. Under *Anderson v. Creighton*, government officials are not liable unless "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what [they are] doing violates that right." 483 U.S. 635, 640 (1987). However, under *Hope v. Pelzer*, government officials may be liable where they had "fair and clear warning" that their actions were unlawful. 536 U.S. 730, 741 (2002). Although both approaches consider whether the right violated was clearly established, *Anderson*'s assessment relies on a narrow lens, whereas *Hope*'s lens is wider.

Under either approach, Respondents are entitled to qualified immunity. Under *Anderson*, this Court should find in favor of Respondents because the right to outdoor exercise has not been defined in a "particularized" manner. 483 U.S. at 640. In fact, at the time of the alleged violation, Seventh Circuit caselaw did not require inmates to be afforded outdoor exercise when they were

provided with a meaningful opportunity for indoor exercise. Similarly, under *Hope*, Respondents did not have "fair warning" that their conduct was unlawful 536 U.S. at 741. Precedent from this Court, the Seventh Circuit, and various other circuits suggested that providing Petitioner with one-hour, five-days per week of indoor, out-of-cell exercise was lawful. R. at 5. Thus, under either test, a genuine issue of material fact does not exist, and Respondents are entitled to summary judgment because their conduct did not violate Petitioner's clearly established rights.

A. Under *Anderson*, there was no clearly established right to outdoor exercise because the right to outdoor exercise was not particularized by either Supreme Court or Seventh Circuit precedent.

Anderson's requirement that a right be defined in a particularized manner for a government official to be held liable necessitates a finding that Respondents are entitled to qualified immunity. This Court has emphasized that "in the light of pre-existing law the unlawfulness [of the officials' conduct] must be apparent." *Anderson*, 483 U.S. at 640. In fact, a case does not have to be "directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *see Malley*, 475 U.S. at 341. While this Court has not addressed whether inmates are entitled to outdoor exercise, the Seventh Circuit has evaluated various cases involving nuanced factual circumstances. Neither court's jurisprudence makes it sufficiently clear that Respondents' conduct was unlawful. In fact, Seventh Circuit precedent could lead reasonable prison officials to believe that providing an inmate with a opportunity for meaningful, indoor exercise for one-hour, five-days per week where outdoor exercise was withheld for safety reasons was constitutional.

1. This Court should find that the right to outdoor exercise was not clearly established because Supreme Court precedent had not defined the right with specificity at the time of the alleged violation.

Anderson's emphasis on the importance of a right being particularized before a government official can be held liable requires this Court to find in favor of Respondents, because its own precedent had not established a right to outdoor exercise at the time of the alleged violation. *Anderson*, 483 U.S. at 640. This is because their conduct was not unlawful "in the light of pre-existing law." *Id.*

For example, in *Ashcroft*, this Court held that the Attorney General ("AG") could not be held liable for "an objectively reasonable arrest and detention of a material witness pursuant to a validly obtained warrant." *Ashcroft*, 563 U.S. at 744. This Court emphasized that "not a single judicial opinion" existed as to the unlawfulness of the AG's act. *Id.* at 741. In fact, only a singular, unsupported footnote in a district court decision suggested the opposite. *Id.* Thus, because pre-existing law did not make it sufficiently clear to the AG that his conduct might have been unlawful, he was entitled to qualified immunity. *Id.* While the courts of appeals were split, discussed *infra* at § III.B.2, at the time of the alleged violation,[1] this Court's silence on the right to outdoor exercise would not have made it sufficiently clear for Respondents to believe that providing one-hour, five-days per week of indoor, out-of-cell exercise was lawful.

2. Respondents followed sufficiently clear precedent from the Seventh Circuit requiring that inmates be afforded a meaningful opportunity to exercise by providing Petitioner with access to an indoor recreation room.

At the time of the alleged violation, Seventh Circuit caselaw did not require that inmates be afforded outdoor exercise where they were provided with meaningful opportunities for indoor exercise. Seventh Circuit decisions reflect a requirement that inmates be afforded an opportunity to exercise in their cells or indoors, out-of-cell. The Seventh Circuit has never required an inmate

[1] In the time between Petitioner filing suit and the present case reaching this Court, this Court had denied certiorari to a case involving significantly similar factual circumstances. *See Apodaca v. Raemisch*, 139 S.Ct. 5, 5 (2018).

be afforded outdoor exercise. Thus, Respondents did not violate a clearly established right because they provided Petitioner with one hour, five days per week of indoor, out-of-cell exercise. R. at 5.

A prison's denial of outdoor exercise where indoor, out-of-cell exercise was provided has been upheld. In *Caldwell v. Miller*, a lockdown resulted in an inmate being denied all out-of-cell exercise for a month followed by a six-month period where only one-hour of daily indoor, out-of-cell exercise was allowed. 790 F.2d 589, 600 (7th Cir. 1986). That court found that prison officials had not violated the Eighth Amendment in restricting the inmate's ability to exercise. *Id.* at 601. The instant case is analogous to *Caldwell*. Although the outdoor restriction lengths differ, both Petitioner and the *Caldwell* inmate were provided with one-hour of indoor, out-of-cell exercise. R. at. 5. Additionally, Petitioner and the *Caldwell* inmate were prohibited from outdoor exercise because of concerns involving inmate safety.[2] Thus, under *Caldwell*, Respondents would have believed their conduct was lawful.

Likewise, where inmates were deprived of out-of-cell exercise but had the opportunity to exercise inside their cells, the Seventh Circuit declined to find a constitutional violation. There was not a violation of a clearly established right where an inmate "would have been able to engage in exercise in his cell such as push-ups, sit-ups, jogging in place, and step-ups" even though the inmate was deprived of all out-of-cell exercise for two-months as punishment for a disciplinary infraction. *Thomas v. Ramos*, 130 F.3d 754, 764-65, 756-57 (7th Cir. 1997). Similarly, in *Davenport v. DeRobertis*, a class action encompassing segregated prisoners who

[2] The lockdown in *Caldwell* was instituted after a prison official and two inmates were killed. 790 F.2d at 593. In the present case, Petitioner was prohibited from outdoor exercise after a rival gang member put a threat on his life. R. at 3. Moreover, an inmate had already died as a result of prison gang violence. R. at 2.

were denied out-of-cell exercise from a period of anywhere from over ninety-days to over two-years, the Seventh Circuit acknowledged that the cells were large enough for "push-ups, sit-ups, step-ups, and running in place." 844 F.2d 1310, 1312-13 (7th Cir. 1988). The Court, reviewing the case on an abuse of discretion standard, upheld the district judge's determination that one-hour of out-of-cell exercise was required. *Id*. at 1314. Similar to both the *Thomas* and *Davenport* inmates, Petitioner arguably had the ability to exercise in his cell – which was larger than the cells in both *Thomas* and *Davenport*.[3] However, unlike those inmates, Respondents provided Petitioner with daily out-of-cell exercise for one-hour, five-days per week. R. at 4. Therefore, Respondents would have believed that providing Petitioner with indoor, out-of-cell exercise for one-hour, five-days per week was more than what was required by the clearly established law.

Finally, the Seventh Circuit held that inmates are entitled to out-of-cell exercise absent a penological justification. In *Delaney v. DeTella*, the court noted that depriving an inmate of "all opportunity for exercise outside his cell would . . . violate the Eighth Amendment" absent security concerns. 256 F.3d 679, 687 (7th Cir. 2001). The *Delaney* inmate was deprived of out-of-cell exercise for a six-month period during lockdown[4] and had no "meaningful chance to exercise" because his cell was the "size of a phone booth."[5] *Id.* at 684. The Seventh Circuit found that the absence of a penological justification made the deprivation improper. *Id.* In contrast, the

[3] Petitioner's cell measured eighty square feet. R. at 3. In *Thomas*, the inmate's cell was "as wide as his arm-span and less than two times that distance in length." *Thomas v. Ramos*, 918 F. Supp.228, 230 (N.D. Ill. 1996). The cells in *Davenport* were 4.9 by 10.6 feet (about 50 square feet) and were unsanitary. 844 F.2d at 1312.

[4] The lockdown was instituted by prison officials in order to facilitate the review of security measures, conduct inmate "shakedowns," and redesign inmate cells. *Id.* at 681.

[5] The District Court, however, noted that "inmates were able to workout in their cells by doing sit-ups and push-ups in the open area of the cell, which measured approximately 122 inches long and 43 to 56 inches wide." *Delaney v. DeTella*, 123 F.Supp.2d 429, 434 (N.D. Ill. 2000). Thus, the cell measured between 35 and 46 square feet. The inmate "cited frustration and depression" as "why he did not exercise in his cell." *Id.*

inmate in *Pearson v. Ramos*, was deprived of out-of-cell exercise for a year due to the safety risk he posed. 237 F.3d 881, 883-95 (7th Cir. 2001). Even though his cell was not large enough for him to "exercise in any meaningful way," the court declined to find an Eighth Amendment violation. *Id.* at 890 (Ripple, J., concurring); *id.* at 887. Thus, out-of-cell exercise could be limited where a penological justification existed, even where a meaningful opportunity for in-cell exercise was not present. Here, Respondents provided Petitioner with out-of-cell exercise by allowing access to the indoor recreation room. R. at 5. Moreover, Petitioner arguably had ample space in his cell for meaningful exercise, as discussed above, and was provided with an in-cell exercise instruction pamphlet. *Id.* The pamphlet would have included exercises that could be accomplished both in his cell and in the indoor recreation room. Because Respondents provided Petitioner with the opportunity for out-of-cell exercise as required by *Delaney*, they could not have known their conduct to be unlawful.

Seventh Circuit law made it sufficiently clear that inmates were entitled to a meaningful opportunity to exercise. In the present case, not only did Petitioner have the ability to exercise in his cell, but Respondents ensured that he had access to an indoor recreation room for one-hour, five-days per week. Therefore, Respondents' conduct did not violate a clearly established right.

B. Under *Hope*, precedent from this Court, the Seventh Circuit, and sister circuits failed to provide Respondents with fair warning that limiting Petitioner to indoor exercise was unlawful.

Jurisprudence from this Court and the various circuits was incapable of providing Respondents with fair warning that their conduct was unlawful. *Hope* suggests that government officials may be liable for conduct if they had "'fair warning' that [their] conduct deprived [an individual] of a constitutional right." 536 U.S. at 740. This Court has stated that "general statements of the law are not *inherently* incapable of giving fair and clear warning . . . even

though 'the very action in question has [not] previously been held unlawful.'" *United States. v. Lanier*, 520 U.S. 259, 271 (1997) (citing *Anderson*, 483 U.S. at 640) (alteration in original) (emphasis added). In considering general statements of the law, a court may "determine whether there was such a clear trend in the caselaw that [it] can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 431 (7th Cir. 1989). Where government officials have fair warning that their conduct violates clearly established rights, they are not entitled to qualified immunity. *Hope*, 536 U.S. at 740-42. An evaluation of this Court's fair warning jurisprudence and Seventh Circuit precedent reveals that Respondents would not have had fair warning that their conduct violated Petitioner's right to outdoor exercise. Moreover, an analysis of out-of-circuit cases further supports Respondents' position that fair warning did not exist. Thus, because the law did not provide fair warning that their conduct violated clearly established rights, Respondents are entitled to qualified immunity.

1. Precedent from this Court and the Seventh Circuit did not give Respondents fair warning that providing Petitioner with one-hour, five-days per week of indoor, out-of-cell exercise was unlawful.

Precedent from this Court and the Seventh Circuit did not provide Respondents with fair warning that their actions violated Petitioner's clearly established rights. In determining whether fair warning exists, the fair warning standard broadly considers the information available to government officials at the time they acted. In *Hope*, prison officials handcuffed an inmate to a hitching post as punishment. 536 U.S. at 733-34. From the outset, this Court noted that "the Eighth Amendment violation is obvious," and that "[t]he use of the hitching post . . . 'unnecessar[ily] and wanton[ly] inflicted pain.'" *Id.* at 738, 741. This Court determined that binding circuit precedent, a State Department of Corrections ("DOC") regulation, and a

Department of Justice ("DOJ") Report notifying the State DOC of the unconstitutionality of using a hitching post, sufficed to provide officials with fair warning that their actions violated the inmate's clearly established rights.[6] *Id.* at 741-42.

In the instant case, Respondents did not have fair warning that their conduct was unlawful. As discussed *supra* at § I.A.1, this Court's jurisprudence had not established that restricting an inmate's outdoor exercise was unconstitutional. Additionally, Seventh Circuit precedent, discussed *supra* at § I.A.2, would have allowed reasonable prison officials to believe restricting outdoor exercise was constitutional when an inmate was provided with a meaningful opportunity to exercise indoors. Further, Respondents' decision to limit Petitioner to one-hour, five-days per week of indoor, out-of-cell exercise complied with an applicable FCC Directive and policy, which allowed the Warden discretion in denying yard privileges for "disciplinary or safety reasons." R. at 4, n.2. As a result, Respondents did not have fair warning that their conduct was unlawful.

2. Out-of-circuit precedent did not provide Respondents with fair warning that providing Petitioner with one-hour, five-days per week, of indoor, out-of-cell exercise in lieu of outdoor exercise was constitutionally impermissible.

Out-of-circuit decisions make it apparent that Respondents did not have fair warning that their conduct violated Petitioner's rights. Respondents are entitled to qualified immunity because the circuits have not reached a consensus on whether a right to outdoor exercise exists. Thus, "a consensus of cases of persuasive authority" did not provide fair warning that Respondents actions violated Petitioner's constitutional rights. *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

[6] *See* Ramadanah M. Salaam, *Hope v Pelzer: The Supreme Court Revisits the Qualified Immunity Defense*, 26 Am. J. Trial Advoc. 643, 649-653 (2003) for a detailed discussion on how this Court evaluated precedent, the State DOC regulation and DOJ Report in finding that each sufficed to provide fair warning that their conduct was unlawful.

At the time of the alleged violation, the Fifth and Eleventh Circuits held that depriving an inmate of outdoor exercise was permissible when the inmate could exercise in-cell or had access to indoor, out-of-cell exercise. The inmate in *Wilkerson v. Maggio* was denied outdoor exercise for five-years in accordance with prison policy due to his assignment to maximum security. 703 F.2d 909, 912 (5th Cir. 1983). However, the inmate was provided with daily out-of-cell exercise for one-hour in a cell block "thirty-yards long" and was also able to exercise within his cell. *Id.* The Fifth Circuit found that one-hour of indoor exercise "satisfied the constitutional minimum." *Id.* Similarly, the inmates in *Bass v. Perrin* were deprived of outdoor exercise for two and a half years due to security concerns. 170 F.3d 1312, 1315-17 (11th Cir. 1999). In finding that the complete denial of outdoor exercise did not violate the Eighth Amendment, the Eleventh Circuit emphasized that the inmates had daily cell-front medical evaluations, additional medical evaluations upon request, and had a booklet for in-cell exercises. *Id.* at 1317.

The similarities between the instant case and both *Wilkerson* and *Bass* would not have provided Respondents with fair warning that their conduct was unconstitutional. In the instant case, Petitioner's deprivation for twenty-six-months pales in comparison to that of the *Wilkerson* inmate (sixty-months) and is shorter than that of the *Bass* inmates. R. at 7. Like the *Wilkerson* inmate, Respondents provided Petitioner with indoor, out-of-cell exercise. R. at 5. Moreover, like all of the inmates, Petitioner had room to exercise in his cell and, like the *Bass* inmates, was provided with information on in-cell exercise. *Id.* Similar to the *Bass* inmates, Petitioner's outdoor exercise was limited for safety reasons. R. at 6 n.11. Consequently, clearly established law from the Fifth and Eleventh Circuits would have given Respondents fair warning that their conduct was lawful.

At the time of the alleged violation, the Fourth and Tenth Circuits had not found a clearly established right to outdoor exercise even where the record was silent on whether the inmate had access to indoor, out-of-cell exercise. The inmate *Mitchell v. Rice*, spent thirty-two months in solitary confinement in a sixty-seven-square-foot cell[7] and was deprived of outdoor exercise for eighteen of those months. 954 F.2d 187, 189 (4th Cir. 1992). Though provided "an exercise manual demonstrating in-cell exercises," the Court noted that "generally a[n inmate] should be permitted some regular out-of-cell exercise." *Id.* at 189, 191. In remanding the case, the Fourth Circuit emphasized that "[a] detailed review of the feasibility of alternatives . . ., such as solitary out-of-cell exercise periods, or the adequacy of in-cell exercise would need to precede a grant of qualified immunity." *Id.* at 193. Similarly, in *Perkins v. Kansas City Dep't of Corrections*, an inmate was denied out-of-cell exercise for thirteen-months after spitting on prison guards. 165 F.3d 803, 806 n.4 (10th Cir. 1999). Though silent on the inmate's out-of-cell exercise opportunities, the Court emphasized that circuit precedent did not "expressly [hold] that prisoners ha[d] a constitutional right to exercise."[8] *Id.* at 810.

Mitchell and *Perkins* would have given Respondents "fair warning" that their conduct was lawful. Although Petitioner's restriction on outdoor exercise was longer than that of the inmates in *Mitchell* and *Perkins*, Respondents provided Petitioner with indoor, out-of-cell exercise, which neither inmate in *Mitchell* or *Perkins* had access to. R. at 5. Unlike the inmate in

[7] In contrast, Petitioner's cell was thirteen-square-feet (approximately 2.2 feet by 5.9 feet or 2.1 feet by 6.2 feet) larger.

[8] In more recent cases, the Tenth Circuit has clarified that a right to outdoor exercise does not exist. *See Apodaca v. Raemisch*, 864 F.3d 1071, 1079 (10th Cir. 2017) ("no clearly established right to outdoor exercise over an eleven-month period"); *Lowe v. Raemisch*, 864 F.3d 1205, 1211 (10th Cir. 2017) (two-year, one-month deprivation did not violate clearly established law); *see also Housely v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994) (noting Tenth Circuit had not established constitutional right to exercise); *but see Fogle v. Pierson*, 435 F.3d 1252, 1260 (10th Cir. 1994) (remanding to district court where deprivation lasted three-years).

Mitchell, Petitioner's cell was larger and Petitioner was permitted regular out-of-cell exercise. *Id.* Moreover, Petitioner had adequate space for in-cell exercise and, like the *Mitchell* inmate, had an exercise pamphlet demonstrating in-cell exercises. *Id.* Because Respondents provided Petitioner with one-hour, five-days per week of indoor, out-of-cell exercise – more than what officials in *Mitchell* and *Perkins* provided when the Fourth and Tenth Circuits declined to find constitutional violations – they would not have had fair warning that their conduct was unlawful.

At the time of the alleged violation, the Sixth Circuit had emphasized that *any* amount of outdoor exercise was not clearly established. *Rodgers v. Jabe*, 43 F.3d 1082, 1083 (6th Cir. 1995). In *Rodgers*, prison policy mandated that inmates in punitive segregation be denied outdoor exercise except for one-hour, five-days per week after each thirty-day period of being denied outdoor exercise. *Id.* at 1085. That court found that the prison officials were entitled to qualified immunity because the deprivation was in accord with prison policy. *Id*. at 1083, 1088-89*; see also Walker v. Mintzes*, 771 F.2d 920, 927 (6th Cir. 1985) (refusing to suggest any amount of exercise mandated by Constitution).

Here, Petitioner's exercise limitation complied with FCC Policy. R. at 4, n.2. Although Petitioner's recreation occurred indoors, Petitioner had access to five-hours per week (about twenty-hours every thirty-days), which is seventy-five percent more time for recreation than the inmate in *Rodgers*. R. at 5. Thus, the Sixth Circuit would not have provided Respondents with fair warning that their conduct was unlawful.

In diverging from other circuits, the Second and Ninth Circuits, at the time of the alleged violation, had concluded that a clearly established right to outdoor exercise existed absent a safety justification. In *Sostre v. McGinnis*, an inmate was deprived of outdoor exercise for twelve months and eight days because he refused to submit to mandatory strip searches. 442 F.2d 178,

186 (2d Cir. 1971). In finding that the inmate's Eighth Amendment rights were not violated, the Second Circuit afforded deference to the prison officials because the strip search was required for safety during outdoor exercise. *Id.* at 191-92. However, in *Williams v. Greifinger*, that court found that an inmate's rights were violated for having been deprived of out-of-cell exercise for a year and a half where prison officials' concerns over staff and inmate unrest, as well as the possibility of contagion, were not sufficient to trigger the safety exception to the right to outdoor exercise. 97 F.3d 699, 701, 707-08 (2d Cir. 1996). Additionally, the Ninth Circuit found that outdoor exercise was required for inmates in segregation who had been deprived of outdoor exercise for over four-years. *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979). The Court did not decide whether depriving inmates of outdoor exercise was a *per se* Eighth Amendment violation. *Id*. at 199*; but see LeMaire*, 12 F.3d at 1457-58 (no constitutional violation when inmate had no outdoor exercise for five-years due to security concerns but could exercise in his forty-eight-square-foot cell).

Here, Respondents could have reasonably believed that factual differences from *Williams* and *Spain* made their conduct permissible. Because Petitioner was in AS for safety, as discussed [in omitted portion], Respondents may have thought the Second Circuit's safety exception applied. R. at 6 n.11. Respondents also could have found *Spain* to be inapplicable because the deprivation lengths differed and, unlike the *Spain* inmates, Petitioner had regular access to indoor, out-of-cell exercise. R. at 5, 7. Moreover, at eighty-square-feet, Petitioner's cell afforded space for in-cell exercise and was larger than the segregation cells in *Spain*, which were approximately forty-eight-square-feet. R. at 4; *Spain v. Procunier*, 408 F. Supp. 534, 451 (N.D. Ca. 1976). Differences between the present case and *Williams* and *Spain* would have failed to provide Respondents with fair warning that their conduct was unlawful. Even if *Williams* and

Spain could have established fair warning, the circuit split provided Respondents with "breathing room to make reasonable but mistaken judgments about [an] open legal question." *Ashcroft*, 563 U.S. at 743.

Conclusion

For the reasons set forth above, Respondents respectfully request that this Court affirm the judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
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September 8, 2020

VIA ELECTRONIC MAIL

The Honorable Elizabeth W. Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
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Re: Judicial Clerkship Application

Dear Judge Hanes:

I write to apply for a two-year clerkship in your chambers beginning August 2021. I am a 2020 graduate of the University of Arkansas School of Law. Enclosed please find my resume, law school transcript, and writing sample. Letters of recommendation will arrive under separate cover. I would be pleased to provide any other materials that might be of interest to you.

As an aspiring public service attorney, I am confident I would make a substantial contribution to your chambers. The breadth of my writing experience reflects a devotion to upholding and improving the law at the practical, academic, and judicial levels. As a third-year law student, I worked as a felony law clerk at my local prosecutor's office, wrote three academic articles published in *Arkansas Law Notes*, and served as an extern for the Honorable Timothy L. Brooks in the United States District Court for the Western District of Arkansas. I also became the first ever solo competitor to win the Ben J. Altheimer Moot Court Competition. After graduation, I wrote my fourth academic article, *Weed, Dogs & Traffic Stops*, which is forthcoming in the *Wyoming Law Review*. I believe my diverse array of writing experiences would translate well to your chambers.

I very much hope for the opportunity to interview with you. Please do not hesitate to contact me should you have any questions. Thank you for considering my candidacy.

Very truly yours,

Alex Carroll

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Juris Doctor, *cum laude*, May 2020 **(**GPA: 3.247; Rank: 41/114)
- Activities & Honors: Winner of the 2020 Ben J. Altheimer Moot Court Competition (best oralist, runner-up best brief); 2018 Board of Advocates Trial Competition; 2017 Board of Advocates Negotiation Competition; 2017 LRW Oral Argument Award (best oralist—appellant); Dean's List (fall 2018, spring 2019, and fall 2019); Student Mentorship Program.

University of Arkansas, Fayetteville, AR
Bachelor of Science in International Business (Supply Chain Management Concentration), May 2016

PUBLICATIONS

- Alex C. Carroll, *Weed, Dogs & Traffic Stops*, 21 WYO. L. REV. (forthcoming 2021).
- Alex C. Carroll, *An Uncomfortable Truth: Arkansas's Approach to Warrantless Vehicle Searches is Unconstitutional*, 2020 ARK. L. NOTES 1 (2020).
- Alex C. Carroll, *Expansive Automobile Access in Arkansas: The Untold Story*, 2019 ARK. L. NOTES 70 (2019).
- Alex C. Carroll, *Unpacking the Convoluted History of the Automobile Exception*, 2019 ARK. L. NOTES 32 (2019).

LEGAL EMPLOYMENT

Professor Brian R. Gallini, Fayetteville, AR — June 2019–Present
Research Assistant
- Research criminal law and procedure issues in judicial opinions and secondary sources for use in forthcoming articles; edit academic writing for publication in traditional legal scholarship and widely read legal blogs.
- Draft language for inclusion in a scholarly article about the relationship between drug-detection dogs and traffic stops.

Fourth Judicial District Prosecuting Attorney's Office, Fayetteville, AR — August 2018–May 2020
Felony Law Clerk & Rule XV Student Attorney
- Examined witnesses and argued for directed verdicts during felony trials; wrote over 200 felony arrest warrants; drafted motions, orders, and memoranda; reviewed police reports for probable cause; managed and evaluated citizen complaints.
- Attained knowledge of trial advocacy, police investigative techniques, and sentencing and plea considerations.

United States District Court for the Western District of Arkansas, Fayetteville, AR — August 2019–December 2019
Judicial Extern for the Honorable Timothy L. Brooks
- Drafted judicial opinions, including *United States v. Foster* (available at 2019 WL 4580485), and bench memoranda; recommended case dispositions; researched criminal and civil legal issues; attended a variety of hearings; reviewed court filings.
- Studied the Federal Sentencing Guidelines; acquired further knowledge of torts, contracts, employment discrimination, constitutional law, and search and seizure.

Arkansas Access To Justice, Little Rock, AR — December 2016–January 2017
Law Clerk
- Drafted policy and memoranda; conducted legal research; compiled statewide attorney pro bono information.
- Acquired exposure to legal aid providers, legislative bills, and professional responsibility requirements.

OTHER EMPLOYMENT

Advanced Group Services, Sydney, Australia — January 2018–May 2018
Head General Laborer
- Led a team of general laborers to complete demolition work, pour concrete, control traffic, and load and offload supply vehicles.
- Assisted carpenters, plumbers and electricians with renovating commercial and residential properties.

Mr. Bananas LTD., Tully, Australia — September 2017–December 2017
General Farm Hand
- Harvested, cleaned, sorted, and packaged bananas; repaired and maintained irrigation systems; performed general upkeep of banana trees and farm equipment.

AFFILIATIONS & INTERESTS

- Admitted to practice law in Arkansas (2020) (pending swearing-in ceremony).
- Spanish (proficient); finished two marathons and four half marathons; traveled to twenty-five countries.

Alex Carroll
University of Arkansas School of Law
Cumulative GPA: 3.247

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Brian Gallini	B	4	
Civil Procedure	Amanda Hurst	B	4	
Legal Research & Writing I	Lisa Avalos	B+	3	
Torts	Alena Allen	B-	4	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Property	Carl Circo	B-	4	
Legal Research & Writing II	William Prettyman	A-	3	
Contracts	Sharon Foster	B-	4	
Constitutional Law	Mark Killenbeck	B	4	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Remedies	Jill Lens	B+	3	
Domestic Relations	W. Marshall Prettyman	B	3	
Environmental Law	Sara Gosman	B	3	
Business Organizations	Carol Goforth	B	4	
Contract Drafting	Lucas Regnier	A-	2	Upper Level Writing Course

Term Honor: Dean's List

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure I	Brian Gallini	B-	3	
Trial Advocacy	The Honorable Timothy L. Brooks	A	3	
First Amendment	Mark Killenbeck	A	3	
Professional Responsibility	Jordan Woods	A-	3	
Basic Evidence	Laurent Sacharoff	B	3	

Term Honor: Dean's List

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Cyber Crime	Laurent Sacharoff	B+	3	
Supreme Court Seminar	Mark Killenbeck	A	2	Upper Level Writing Course
Interview, Counsel, & Negotiate	Carl Circo	A	3	

Judicial Externship: Field Service Learning	The Honorable Timothy L. Brooks	CR	2	Pass/Fail Credit
Judicial Externship: Classroom Service Learning	Angela Doss	A	1	
Wills, Trusts, and Estates	Stephen Clowney	A-	4	

Term Honor: Dean's List

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Federal Courts	Alan Trammell	P	3	
Criminal Procedure II	Alex Nunn	P	3	
Police Discretion Seminar	Brian Gallini	P	2	Upper Level Writing Course
Capital Punishment	Laurent Sacharoff	P	3	
Judicial Opinion Writing	Clay Sapp	P	2	Upper Level Writing Course
Multistate Substance & Strategies	Susannah Pollvogt	P	2	Bar Preparation Course

Due to COVID-19, the University of Arkansas School of Law adopted a mandatory pass/fail policy for the spring 2020 semester.

Grading System Description

Grading System

For numerical evaluations, grades are assigned the following values:

Grade Value
A 4.00
A- 3.67
B+ 3.33
B 3.00
B- 2.67
C+ 2.33
C 2.00
C- 1.67
D+ 1.33
D 1.00
D- 0.67
F 0.00

Policies adopted by the faculty establish grade medians that apply to most courses (B- in most first-year courses and B or B- in most other courses), subject to limited exceptions. The faculty has also adopted a policy that ordinarily, once a final grade (other than an “incomplete”) has been entered for a given class, that grade will be changed only because of mathematical or similar errors in the calculation of the grade.

https://law.uark.edu/academics/academic-policies.php

September 08, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I work as a deputy prosecutor in the Fourth Judicial District in Arkansas. Alex Carroll is a law clerk for our office. I understand that Alex applied for a position to work for you. I believe he is an excellent choice for the opening you have.

Alex started in our office in the fall of 2018. Among other tasks, law clerks handle the countless warrant requests in our office. If it is not an emergency request, then it is dependent upon the clerks to work through the warrant requests. Before Alex joined, we were very behind. Alex made an immediate impact by getting our office caught up on warrant requests. It was a great undertaking on his part.

Something that Alex shows a great skill for is evaluating cases. Alex is tasked with reviewing case files and presenting them to prosecutors. This process requires him to not only find helpful evidence in cases, but also potential issues. Alex often does research before discussing cases and answers questions that arise during conversations about the strengths/weaknesses of the facts. If no one knows the answer, Alex always volunteers to research the topic.

Beyond anything else, Alex has a tremendous work ethic. He has been an appreciated resource for me on several cases. Some of the cases dealt with serious violent or sexual offenses. Alex's work was quick and clear and aided in my decision-making.

I fully believe that Alex will be an asset to you, as he is for our office. He will undoubtedly succeed wherever he goes and quickly prove his value. If you would like to discuss this further, feel free to contact me at my email listed below.

Best,

Dylan Weisenfels
Deputy Prosecuting Attorney
4th Judicial District
Fayetteville, AR
dweisenfels@co.washington.ar.us

Alex Carroll
309 North Hughes St. • Little Rock, AR 72205
(501) 350-5379 • alexcarr93@gmail.com

Writing Sample

The attached writing sample, *United States v. Foster*, is a self-edited draft of an opinion that I wrote for the Honorable Timothy L. Brooks in the United States District Court for the Western District of Arkansas. The opinion denies a motion to suppress evidence found on the defendant's person during the course of a routine traffic stop. As part of doing so, it wrestles with the defendant's argument that driving with a cracked windshield is not a traffic violation under Arkansas law. Although Arkansas does not have a statute explicitly outlawing cracked windshields, the opinion identifies a sufficiently analogous statute to justify the officer's stop.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA **PLAINTIFF**

V. **CASE NO. 5:19-CR-50037-1**

CHARLIE FOSTER **DEFENDANT**

MEMORANDUM OPINION AND ORDER

Currently before the Court is Defendant Charlie Foster's Motion to Suppress (Doc. 20) and the Government's Response (Doc. 22). On May 8, 2019, Mr. Foster was charged by Indictment (Doc. 1) with knowingly possessing a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C §§ 922(g)(1) and 924(a)(2). Mr. Foster seeks to suppress evidence related to a firearm found on his person and which led to his indictment. For the reasons given below, Mr. Foster's Motion is **DENIED**.

I. BACKGROUND

The following facts are lifted from Mr. Foster's Motion to Suppress. (Doc. 20). On March 5, 2019, Officer Johnson with the Springdale Police Department stopped a black Toyota Avalon for "having an unsafe windshield (several cracks)." *Id.* at 1. Officer Johnson made contact with the driver of the vehicle, Mr. Foster, and explained, "the reason I pulled you over is you got this cracked windshield." *Id.* at 5. Officer Johnson then asked Mr. Foster and his female passenger for identification. Mr. Foster provided his driver's license, and the passenger, who did not have a form of identification, provided a name that was later determined to be fictitious. At that time, Officer Johnson noted that Mr. Foster and

the passenger appeared to be "very nervous." *Id.* at 1. Specifically, Officer Johnson observed Mr. Foster's hands shaking.

After returning to his police cruiser to check Mr. Foster and his passenger for outstanding warrants, Officer Johnson observed Mr. Foster and the passenger "moving around inside the vehicle." *Id.* at 1-2. Additionally, Officer Johnson learned from dispatch that Mr. Foster was on parole with a search waiver on file and that the passenger had an active warrant for her arrest. At that time, Officer Johnson returned to the vehicle and ordered Mr. Foster to step outside. Complying with that order, Mr. Foster exited the vehicle and "tugged his jacket down with his hand". *Id.* at 2. Officer Johnson then explained to Mr. Foster that he had observed Mr. Foster and his passenger moving around in the vehicle, to which Mr. Foster replied that the two were "putting the paperwork back in the glove compartment." *Id.* Officer Johnson then conducted a pat down of Mr. Foster for weapons, which revealed a handgun.

In his Motion to suppress, Mr. Foster asks this Court to suppress the handgun found on his person. Mr. Foster advances two arguments in support of this request: (1) that Officer Johnson did not have probable cause to make the initial traffic stop; and (2) that Officer Johnson unreasonably extended the initial stop by asking Mr. Foster and his passenger for identification. Notably, Mr. Foster does not argue that the search of his person was unconstitutional. The Motion has been fully briefed, and the matter is now ripe for decision.

II. LEGAL STANDARD

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

> and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Simply put, the basic purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *United States v. Carpenter*, 138 S. Ct. 2206, 2213 (2018) (internal quotation marks omitted).

For Fourth Amendment purposes, "[i]t is well established that a roadside traffic stop is a 'seizure' within the meaning of the Fourth Amendment." *United States v. Jones*, 269 F.3d 919, 924 (8th Cir. 2001). To be a reasonable seizure, "a traffic stop must be supported by, at a minimum, 'a reasonable, articulable suspicion that criminal activity' is occurring." *United States v. Frasher*, 632 F.3d 450, 453 (8th Cir. 2011) (quoting *Jones*, 289 F.3d at 924.). A traffic violation, even for a minor infraction, provides the necessary quantum of suspicion to stop a vehicle and its occupants. *See Frasher*, 632 F.3d at 453. Thus, a police officer may lawfully conduct a traffic stop of a vehicle when the officer is "aware of particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant suspicion" that a traffic violation is being committed. *United States v. Martin*, 706 F.2d 263, 265 (8th Cir. 1983).

To determine whether a police officer had the requisite level of suspicion to conduct a valid traffic stop, a court must look at whether "the facts available to the officer at the moment of the seizure or the search [would] warrant a man of reasonable caution in the belief that the action taken was appropriate[.]" *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968) (internal quotation marks omitted). Although "something more than a 'hunch' of wrongdoing is necessary, the level of suspicion required to support a traffic stop is

'considerably less' than proof of wrongdoing by a preponderance of the evidence. *States v. Edgerton*, 438 F.3d 1043, 1047 (10th Cir. 2006) (internal quotation marks omitted). Furthermore, "mistakes of law or fact, if objectively reasonable, may still justify a valid stop." *United States v. Hollins*, 685 F.3d 703, 706 (8th Cir. 2012). "[I]n mistake cases the question is simply whether the mistake, whether of law or of fact, was an objectively reasonable one." *United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005). In sum, the determination of whether reasonable suspicion existed "is not to be made with the vision of hindsight, but instead by looking to what the officer reasonably knew at the time." *Hollins*, 685 F.3d at 706 (quoting *United States v. Sanders*, 196 F.3d 910, 913 (8th Cir. 1999)).

Following a valid traffic stop, a police officer may conduct "routine tasks related to the traffic violation[.]" *Chartier*, 772 F.3d at 543. In addition to determining whether to issue a traffic citation, such tasks include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015). "If, during the course of completing these routine tasks, 'the officer develops reasonable suspicion that other criminal activity is afoot, the officer may expand the scope of the encounter to address that suspicion.'" *United States v. Chartier*, 772 F.3d 539, 543 (8th Cir. 2014) (quoting *United States v. Peralez*, 526 F.3d 1115, 1120 (8th Cir. 2008). Absent suspicion of other criminal activity, a traffic stop "remains lawful only 'so long as [the] unrelated inquiries do not measurably extend the duration of the stop.'" *Rodriguez*, 135 S. Ct. at 1615 (quoting *Arizona v. Johnson*, 555 U.S. 323, 333 (2009)).

In a criminal case, a defendant may move to suppress the use of evidence at trial that the defendant believes was obtained in violation of the Fourth Amendment, including any "fruit" deriving from that evidence. *See Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963). Such evidence is suppressed only when two separate determinations are made: (1) that "the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct," and (2) that "the exclusionary sanction is appropriately imposed in a particular case." *United States v. Leon*, 468 U.S. 897, 906-07 (1984).

Applying the forgoing to the facts at hand, the Government bears the burden of proving by a preponderance of the evidence that Mr. Foster's Fourth Amendment rights were not violated during the March 5, 2019 traffic stop, or alternatively, that suppressing the handgun found on Mr. Foster's person is not an appropriate remedy in this case. *See, e.g.*, *Carter v. United States*, 729 F.2d 935, 940 (8th Cir. 1984) ("As a general rule, the burden of proof is on the defendant who seeks to suppress evidence, but on the government to justify a warrantless search.") (internal citations omitted); *cf. United States v. Matlock*, 415 U.S. 164, 178 n.14 (1974) ("In any event, the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence.").

III. Discussion

Respecting Mr. Foster's first argument, the Court begins by noting that it is not contested whether Mr. Foster had a crack in his windshield. Mr. Foster simply argues that the crack in his windshield, which he describes as being "towards the dashboard" (Doc.

20, p. 4), does not amount to a traffic violation under Arkansas law.[1] Although Arkansas does not have a statute *explicitly* outlawing cracked windshields, Mr. Foster correctly acknowledges that both the Eight Circuit and Arkansas Supreme Court have held that driving with a cracked windshield violates Ark. Code Ann. 27-32-101 (a)(2)(A).[2] *United States v. Davis*, 598 F. App'x 472, 473 (8th Cir. 2015) (unpublished opinion) ("Driving a vehicle with a windshield cracked across the driver's field of vision … is a 'safety defect' under Ark. Code Ann. § 27–32–101(a)(2)(A)."); *Villanueva v. State*, 2013 Ark. 70 at 5 (2013) (holding that "a windshield with a crack running from roof post to roof post across the driver's field of vision is the type of 'safety defect' contemplated by section 27–32–101(a)(2)(A))"). Mr. Foster seeks to distinguish his cracked windshield from those in *Davis* and *Villanueva* because the crack in his windshield did not obstruct his field of vision. Accordingly, Mr. Foster argues that Officer Johnson did not have probable cause to conduct the March 5, 2019 traffic stop because no traffic violation occurred.

As previously explained, the validity of the March 5, 2019 traffic stop does not depend on whether Mr. Foster's windshield actually violated Ark. Code Ann. 27-32-101(a)(2)(A). The Eighth Circuit has held, "[m]istakes of law or fact, if objectively reasonable, may still justify a valid stop." *Hollins*, 685 F.3d at 706; *see also United States v. Smart*, 393 F.3d 767, 770 (8th Cir. 2005) ("[T]he validity of a stop depends on whether

[1] Mr. Foster attached four still photographs of his windshield that were taken from police body cameras during the traffic stop. (Doc. 20-1); (Doc. 20-2); (Doc. 20-3); (Doc. 20-4). The Court has reviewed these photographs and finds by a preponderance of the evidence that there was an observable crack in Mr. Foster's windshield.

[2] Ark. Code Ann. 27-32-101(a)(2)(A) provides in relevant part, "[a]ny law enforcement officer having reason to believe that a vehicle may have safety defects shall have cause to stop the vehicle[.]" Ark. Code Ann. 27-32-101 (a)(2)(A) (West).

the officer's actions were objectively reasonable in the circumstances, and in mistake cases the question is simply whether the mistake, whether of law or of fact, was an objectively reasonable one."); *United States v. Williams*, 929 F.3d 539, 544 (8th Cir. 2019) (explaining that all determinations of reasonable suspicion or probable cause, including those in mistake cases, are made by looking at what the police officer knew at the time the search or the seizure was conducted).

A police officer, therefore, does not need to be certain that a traffic violation has occurred in order to conduct a lawful traffic stop; the officer needs only a reason to suspect that such a violation as occurred. *See New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985) ("But the requirement of reasonable suspicion is not a requirement of absolute certainty: 'sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment.'" (quoting *Hill v. California*, 401, U.S. 797, 804 (1971))); *see also United States v. Edgerton*, 438 F.3d 1043, 1047 (10th Cir. 2006) ("While something more than a hunch of wrongdoing is necessary, the level of suspicion required to support a traffic stop is considerably less than proof of wrongdoing by a preponderance of the evidence.") (internal quotation marks omitted).

The Court has no trouble finding by a preponderance of the evidence that Officer Johnson had, at a minimum, a reason to suspect that Mr. Foster's cracked windshield was a traffic violation under Arkansas law. As Mr. Foster explains in his Motion, Officer Johnson articulated the purpose for the stop: "[t]he reason I pulled you over is you got this cracked windshield." (Doc. 20, p. 5). Even if Officer Johnson was mistaken in believing that the windshield violated Ark. Code Ann. § 27–32–101(a)(2)(A), the Court finds by a preponderance of the evidence that his mistake would be a reasonable one. In

sum, Mr. Foster was not unreasonably seized when Officer Johnson stopped his vehicle for having an unsafe windshield.

As for his second argument, Mr. Foster reasons that once Officer Johnson observed that the cracked windshield did not impair his vision, Officer Johnson no longer had a reason to suspect that a traffic violation had been committed. Thus, concludes Mr. Foster, Officer Johnson unlawfully extended the traffic stop by requesting identification from Mr. Foster and his passenger.

Mr. Foster's second argument is not novel. The Eighth Circuit has decisively held that an officer may request identification from the occupants of a vehicle following a lawful traffic stop. *United States v. Clayborn*, 339 F.3d 700, 702 (8th Cir. 2003). In *Clayborn*, Missouri Detective Lee Hall stopped a vehicle for driving without license plates. *Id.* at 701. Detective Hall made contact with the vehicle's driver, Roosevelt Clayborn, and informed him of the stop's purpose. *Id.* Clayborn then pointed out that the vehicle did, in fact, have temporary tags, which Detective Hall had not observed when he stopped and approached the vehicle. *Id.* Despite being made aware that no traffic violation had occurred, Detective Hall asked Clayborn for his registration papers, insurance card, and driver's license. *Id.* A subsequent check revealed that Clayborn's license was suspended. *Id.* Clayborn was subsequently arrested for drug and firearm offenses discovered as the stop transpired. *Id.*

On appeal to the Eighth Circuit, Clayborn argued that once Detective Lee observed that the vehicle had a temporary tag, he unreasonably extended the scope of the traffic stop by asking for Clayborn's registration papers and identification. *Id.* at 702. In rejecting that argument, the Eighth Circuit held "Detective Hall's actions did not exceed those

justified by the traffic stop and no violation of the Fourth Amendment occurred." *Id.* The court reasoned that a police officer does not unconstitutionally extend a valid traffic stop by requesting proof of license and registration. *Id.*

The Eighth Circuit's decision in *Clayborn* forecloses Mr. Foster's second argument. The Eighth Circuit "has 'consistently held that a reasonable investigation following a justifiable traffic stop may include asking for the driver's license and registration.'" *Hollins*, 685 F.3d at 706-07. Furthermore, even assuming Officer Johnson at some point realized that Mr. Foster's windshield did not violate Arkansas law, Officer Johnson did not unconstitutionally extend the valid traffic stop by requesting Mr. Foster's identification. Accordingly, Mr. Foster was not unreasonably seized as a result of Officer Johnson asking for his and his passenger's identification.

To summarize, Officer Johnson conducted a lawful traffic stop of Mr. Foster's vehicle for having a cracked windshield, and even if Officer Johnson was mistaken in believing that Mr. Foster's windshield violated Arkansas law, he was justified in asking Mr. Foster and his female passenger for identification. Simply put, at no point during the March 5, 2019 traffic stop was Mr. Foster subjected to an unconstitutional seizure within the meaning of the Fourth Amendment.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Mr. Foster's Motion to Suppress Evidence (Doc. 20) is **DENIED**. This case will be set for trial in a separate scheduling order.

IT IS SO ORDERED on this _____ day of September, 2019.

_____
TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

Applicant Details

First Name	**Emily**
Middle Initial	**R**
Last Name	**Castleman**
Citizenship Status	**U. S. Citizen**
Email Address	**emilycastleman@mac.com**
Address	**Address** Street **6847 Washington Blvd, UNIT 303** City **Arlington** State/Territory **Virginia** Zip **22213** Country **United States**
Contact Phone Number	**7345460445**

Applicant Education

BA/BS From	**Pennsylvania State University-University Park**
Date of BA/BS	**May 2019**
JD/LLB From	**American University, Washington College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010**
Date of JD/LLB	**May 23, 2022**
Class Rank	**Not yet ranked**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just The Beginning Foundation**

References

1. Hon. Zuberi B. Williams
Phone Number: (301) 643-7333
E-mail: zublaw@gmail.com

2. Joseph Xuereb, Esq.
Phone Number: (734) 455-2000
E-mail: jxuereb@xuerebsnow.com

3. Michael S. Coffee, Esq.
Phone Number: (202) 616-1916
E-mail: Michael.S.Coffee@usdoj.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

EMILY RYANN CASTLEMAN

emilycastleman@mac.com ❖ (734) 546-0445 ❖ Arlington, Virginia

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The Honorable Elizabeth W. Hanes
U.S. District Court for the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Magistrate Judge Hanes:

I am Emily Ryann Castleman, a third-year law student at the American University's Washington College of Law (WCL). I am writing to apply for a 2022-2023 clerkship with your chambers. Clerking in your chambers at the U.S. District Court for the Eastern District of Virginia would be my first choice for a job after I graduate.

I recently interned with Judge Zuberi B. Williams at the Montgomery County District Court, so I would make a strong addition to your chambers. As a former judicial intern, I got to "hunker in the trenches" of a busy district court. I saw everyday people with everyday problems come to the American judicial system for help. The law is not an abstract, academic concept for everyday people, it impacts them and the people they love daily. I want to be an advocate for the people who can't always do so for themselves. I want to make a difference.

As a judicial intern, I drafted orders and memoranda, participated in daily mootings, and completed off-the-bench research mid-case. Currently, I am a Legal Clerk for the Department of Justice's Office of Foreign Litigation. The daily rigors of working at the DOJ have honed my legal research and writing skills to be efficient and clear. I have learned to work in a team with grace and humility. At WCL, I am a Dean's Fellow, a writer for the Human Rights Brief, and a student attorney in the Criminal Defense Clinic. Through these extracurriculars, I have learned how to think outside the box, lead with conviction, and always push myself to be better than I was the day before.

This clerkship provides an opportunity to take advantage of my strong legal research background, creative problem-solving skills, and ceaseless pursuit of justice to contribute to your first-class chambers. This clerkship would help me reach my goals of building up my legal writing and advocacy skills. I am looking for an unparalleled, uncompromising teacher. I would be lucky to hear stories from your time as an Assistant Federal Public Defender and as a civil litigator, both of which I would like to do one day. You are an advocate that I would be thrilled to learn from. This clerkship has the resources to push me to grow, a legal training like no other, and an incomparable teacher.

I have enclosed my resume, school transcript, writing sample, references, and letters of recommendation for your review. My writing sample is a memo I completed for Judge Williams regarding an ambiguous phrase in Maryland Criminal Law 3-809(c) regarding Nonconsensual Pornography. I welcome the opportunity to speak with you further about my qualifications and interest. Thank you for your time and consideration.

Respectfully,

Emily Ryann Castleman

Emily Ryann Castleman

emilycastleman@mac.com ❖ (734) 546-0445 ❖ Arlington, VA

EDUCATION

American University Washington College of Law **Aug. 2019 – Present**
Juris Doctor candidate, expected May 2022 *Washington, D.C.*
Activities:

- Criminal Justice Clinic (Defense) Spring 2022—*Student Attorney*
- Marshall-Brennan Constitutional Literacy Project
  - Aug. 2021 – May 2022—*Dean's Fellow*
  - Aug. 2020 – May 2021—*Teaching Fellow*
- Human Rights Brief—*Junior Staffer*
- Center for Human Rights and Humanitarian Law—*Student Advisory Board Member* 2020 Academic Year

The Pennsylvania State University **Aug. 2015 - May 2019**
Bachelor of Arts, Political Science *State College, PA*

- Cumulative GPA: 3.60/4.00
- Honor Roll 2015-2018
- Dean's List 2018-2019
- Study Abroad Summer 2018: 华师大大学 (East China Normal University) Language Program
  - Certified in Conversational Mandarin Chinese

WORK EXPERIENCE

Legal Intern – Department of Justice **May 2021 - Aug. 2021**
Office of Foreign Litigation and Office of International Judicial Assistance *Washington, D.C.*

- Legal research related to complex international legal topics and recent U.S. court decisions interpreting or applying provisions of law
- Drafted memoranda, engaged in collaboration with attorneys and interns, exercised professionalism in all aspects of work
- Reviewed Letters of Request for judicial assistance from foreign courts for treaty compliance, prepared rejection or referral letters, and conducted legal factual research concerning issues arising from such requests for assistance

Intern – Hon. Zuberi B. Williams **June 2020 - Aug. 2020**
JIOP 2020 Summer *Montgomery County District Court, MD*

- Participated in daily legal mootings
- Analyzed current legal issues in cases and gave legal advice
- Research and drafted legal articles
- Attended daily court proceedings
- Became familiarized with standard legal documentations

Legal Intern – Xuereb Law Group, L.L.C. Legal Intern **June 2016 - Aug. 2017**
Wayne and Washtenaw Counties *Canton, MI*

- Helped organize and submit a Michigan Supreme Court case
- Assisted in depositions, subpoenas, and further discovery
- Developed professional relationships with clients through billing, contacting, and recording meetings

SKILLS & INTERESTS

- **Skills** Conversational Chinese; proficiency in Google Drive, Apple Documents, Microsoft, Adobe, LexisNexis & Westlaw; skilled in writing, legal research, and reading; strong public speaking and leadership skills.
- **Interests** Cross-cutting legal and political issues worldwide; Star Trek; philosophy; hip-hop; reading (history, science-fiction, and fantasy); baking; video games; social activism and criminal justice reform.

CASTLEMAN EMILY R 5003248 08/27

06/09/21 1 OF 1

FALL 2019				
LAW-501	CIVIL PROCEDURE	04.00	B-	10.80
LAW-504	CONTRACTS	04.00	B-	10.80
LAW-516	RESEARCH & WRITING I	02.00	B-	05.40
LAW-522	TORTS	04.00	B	12.00
	LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 39.00QP 2.78GPA			
SPRING 2020				
LAW-503	CONSTITUTIONAL LAW	04.00	P	00.00
LAW-507	CRIMINAL LAW	03.00	P	00.00
LAW-517	RESEARCH & WRITING II	02.00	P	00.00
LAW-518	PROPERTY	04.00	P	00.00
LAW-550	LEGAL ETHICS	02.00	P	00.00
	LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 0.00QP 0.00GPA			
FALL 2020				
LAW-508	CRIMINAL PROCEDURE I	03.00	A-	11.10
LAW-619A	COMPARATIVE FAMILY LAW	02.00	A	08.00
LAW-620	INT'L HUMANITARIAN LAW	03.00	B+	09.90
LAW-637	DOMESTIC VIOLENCE	02.00	A-	07.40
LAW-707B	MARSHALL-BRENNAN SEMINAR	02.00	A	08.00
LAW-707B1	MARSHALL-BRENNAN FIELDWORK	01.00	A	04.00
LAW-795Q	HUMAN RIGHTS AND ENVIRONMENT	02.00	B	06.00
	LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 54.40QP 3.62GPA			
SPRING 2021				
LAW-601	ADMINISTRATIVE LAW	03.00	A-	11.10
LAW-633	EVIDENCE	04.00	A-	14.80
LAW-691	SEX-BASED DISCRIMINATION	03.00	A-	11.10
LAW-695	CIVIL TRIAL ADVOCACY	03.00	A	12.00
LAW-707B	MARSHALL-BRENNAN SEMINAR			
	MARSHALL BRENNAN SEMINAR	02.00	A	08.00
LAW-707B1	MARSHALL-BRENNAN FIELDWORK	01.00	A	04.00
	LAW SEM SUM: 16.00HRS ATT 16.00HRS ERND 61.00QP 3.81GPA			
SUMMER 2021				
LAW-769	EXTERNSHIP SEMINAR	02.00	--	--.--
LAW-899	EXTERNSHIP FIELDWORK	04.00	--	--.--
FALL 2021				
LAW-611	BUSINESS ASSOCIATIONS	04.00	--	--.--
LAW-682	CRITICAL RACE THEORY	02.00	--	--.--
LAW-708C	RACE, CRIME & POLITICS	02.00	--	--.--
LAW-756	CRIM JUSTICE DEF CLINIC SEM	03.00	--	--.--
LAW-985	HOUSING LAW	02.00	--	--.--
LAW-992	CRIMINAL JUSTICE ETHICS	03.00	--	--.--
	LAW CUM SUM: 60.00HRS ATT 60.00HRS ERND 154.40QP 3.43GPA			
	END OF TRANSCRIPT			

IN THE DISTRICT COURT OF MARYLAND FOR MONTGOMERY COUNTY

STATE OF MARYLAND, Plaintiff	*	
v.	*	Case Number: [redacted]
[redacted] Defendant	*	

ORDER AND MEMORANDUM

This is a revenge porn case brought by the State of Maryland against Defendant, [redacted]. Specifically, Defendant is charged with violating determination of Maryland Criminal Law § 3-809(c), Revenge porn prohibited.

I. FACTUAL AND PROCEDURAL HISTORY

This case came before the Court on February 13, 2020 for a merit trial**.** Defendant pled guilty to [redacted] and to [redacted]. However, Defendant sought trial on the distribution of revenge porn. During the trial the state adduced the following evidence in their case-in-chief:

1. Defendant and the Victim previously had a consensual sexual relationship.
2. Their relationship ended.
3. A final protective order between the Victim and Defendant was issued on [redacted], effective until [redacted].
4. The final protective order stated that Defendant could not contact or attempt to contact the victim, not could Defendant distribute, show, post, or give any sexual/intimate pictures of the Victim to anyone without the Victim's consent.
5. The Victim then began a sexual relationship with another person.

6. Defendant was angry about the Victim's new relationship.
7. On [redacted], Defendant began to send direct messages to the Victim through social media platforms.
8. On [redacted], Defendant texted the Victim's new partner a pornographic photograph.
9. The photograph depicted Defendant's penis next to the mouth of the victim with male ejaculate on her face.
10. The Victim testified that she had consumed too much alcohol, passed out unconscious, and does not remember the taking of the photograph.
11. The Victim testified that the photograph was taken while she and Defendant were in a relationship.
12. The Victim testified that she did not consent to taking the photograph, to have Defendant's penis placed next to her mouth, or to have ejaculate put on her face.
13. The Victim testified that she did not consent for the photograph to be sent to her new partner.

The Court completed all testimony and the evidence closed. The Court took the following issues *sub curia*:

1. Whether, for purposes of Maryland Criminal Law § 3-809(c), an unconscious person can be "engaged in" sexual activity.

II. DISCUSSION

1. <u>The State is Ambiguous</u>

In this case, the court can consider unconsciousness as "engaged" in sexual activity for purposes of this statute for three reasons: legislative intent, other supporting recognized indicia, and the black-letter definition of "engaged."

A statute is ambiguous when there are at least two or more reasonable alternative interpretations of the statute. *Bellard v. State*, 452 Md. 467, 481, 157 A.3d 272 (2017). When a statute can be interpreted in multiple ways, the court must resolve that ambiguity. *Id*. In determining the meaning of a statute or phrase in a statute, the court must first look to the language of the statute to discern its natural and ordinary meaning. *Id.* There is a presumption by the court that the legislative branch meant what it said and said what it meant. *Id.* If language remains ambiguous, then courts must consider not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives, and the purpose of the enactment under consideration. *Id.* The court should not read any one word or phrase in isolation but read the entire statute as a whole. *Id.*

If true legislative intent still cannot be readily determined from the statutory language alone, the court may, and often must, resort to other recognized indicia such as the structure of the statute, including its title; how the statute relates to other laws; the legislative history, including the derivation of the statute, comments and explanations regarding it by authoritative sources during the legislative process, and amendments proposed or added to it; the general purpose behind the statute; and the relative rationality and legal effects of various competing constructions. *Id.*

When a court construes a criminal statute, it may invoke the "rule of lenity" when a statute is open to more than one interpretation and the court is unable to determine the interpretations intended by the legislative branch. *Id.* at 502. Without arbitrarily choosing one

interpretation over another, the court may select the interpretation that shows deference toward the defendant, treating defendants more leniently. *Id.* The rule of lenity is a tool of last resort to be rarely deployed while other tools of statutory interpretation are available. *Id.*

Here, the phrase "engaged in" is ambiguous because it can be reasonably read more than one way. For example, to actively do something**.** Or, to cause another to take part in something**.** As such, the Court must follow the description in *Bellard*.

a. Maryland Criminal Law § 3-809

Absent case law to draw upon, this case presents an issue of first impression in the state of Maryland. The State is claiming that Defendant is guilty of violating Maryland Criminal Law § 3-809(c). This provision follows:

> A person may not knowingly distribute a visual representation of another identifiable person that displays the other person with his or her intimate parts exposed or while engaged in an act of sexual activity:
> (1) with the intent to harm, harass, intimidate, threaten, or coerce the other person;
> (2) (i) under circumstances in which the person knew that the other person did not consent to the distribution; or
> (ii) with reckless disregard as to whether the person consented to the distribution; and
> (3) under circumstances in which the other person had a reasonable expectation that the image would remain private.

The statute defines "intimate parts" and "sexual activity":

> (4) "Intimate parts" means the naked genitals, pubic area, buttocks, or female nipple.
> (5) "Sexual activity" means:
> (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
> (ii) sodomy under § 3-321 of this title or an unnatural or perverted sexual practice under § 3-322 of this title;
> (iii) masturbation; or
> (iv) sadomasochistic abuse.

MD. CRIM. LAW § 3-809(a)(4-5). The question in this case then becomes whether the photograph shared by Defendant to Victim's current partner depicts the Victim "engaged" in sexual activity, as the victim was unconscious at the time the sexual activity took place.

b. Legislative Intent

The legislative intent of § 3-809 suggests that a person can engage in sexual contact even while unconscious. The court must place legislative intent above all other steps in determining the meaning of an ambiguous statute. *Bellard*, 452 Md. 467 at 481. In looking to the legislative history of § 3-809, there is no indication of the direct definition of the phrase "engage in." However, there are three reasons why the legislative intent of the statute supports an unconscious engagement in a sexual act. First, revenge porn laws stem from a lack of consent from the Victim to disseminate the personal photographs or videos of themselves and the power and control often seen in personal relationships or domestic abuse cases. Second, revenge porn laws are in place to ensure an expectation of privacy of one's own body. Third, the evolution of domestic abuse crimes due to the explosion of the internet necessitate an evolved reading of engagement and sexual activity.

Firstly, the main aspect of all domestic violence or sexual crimes is the cycle of power and control over the victim. National Center on Domestic and Sexual Violence, Power and Control Wheel (1984). The Maryland Criminal Law § 3-809 statute explicitly prohibits the dissemination of revenge porn "with the intent to harm, harass, intimidate, threaten, or coerce the other person." The legislative intent of this statute is to protect a victim from continued harassment regarding a sexual photograph or video of themselves. Revenge porn crimes can engender domestic violence. *Illinois v. Austin*, 2019 IL 123910, 12, 2019 WL 5287962 (2019). While "engaged in" is an element of the statute, there is a noted emphasis on the word "consent."

A person could disseminate sexual photographs of another individual if they had consent. With the emphasis on consenting and protecting a person from harassment, intimidation, etc., the statute speaks to the cycle of power and control inflicted upon victims in domestic abuse cases. The legislative intent of the statute concerns power and control through a lack of consent and a heightened chance of harassment, not just whether someone has engaged in a sexual act.

Next, § 3-809(c)(3) states that a person may not knowingly distribute revenge porn "under circumstances in which the other person has a reasonable expectation that the image would remain private." The government can protect individual privacy rights. *Doe v. Maryland Bd. Of Social Workers*, 154 Md.App. 520, 536, 840 A.2d 744 (2004). The State has an interest in protecting the privacy rights of citizens and in protecting Victims who have suffered a breach of personal privacy. *Id.* The act of sharing personal, private photos implies that they remain private between the person receiving and the person sending. It is not the case that the right to privacy disappears once it has been communicated to another. If the State declines to protect people from the distribution of sexual photographs taken while they were unconscious, the State suggests that privacy and safety while unconscious is not entitled to the same privacy as when conscious.

Finally, the evolution of revenge porn necessitates an evolved interpretation of to be engaged in sexual activity. Revenge porn has existed as early as the 1980s when magazines would publish stolen nude photographs of women in its reader-submission features. Emma Grey Ellis, *It's Time For Facebook to Deal With the Grimy History of Revenge Porn,* Wired (Mar. 14, 2017, 4:49 PM), https://www.wired.com.[1] In the early days of the internet, revenge porn flourished as a means of enacting revenge on ex-girlfriends. Revenge porn experienced a large spike in activity after 2005 with the invention of the video website YouTube and the accessibility

[1] https://www.wired.com/2017/03/revenge-porn-facebook/#:~:text=The%20existence%20of%20revenge%20porn,photos%20and%20videos%20of%20users'

of pornography websites. *Id.* The popularity of "sexting"—sexual-content texting—has only provided more fodder to the revenge porn fire.

The evolution of accessibility to sexual content and the ever-broadening categories of sexual activities are the cornerstones of why revenge porn laws are necessary to begin with. Without the expansion of online access and the increasing number of personal photographs being shared between cellular phones, revenge porn would have been a contained issue. As is it not contained, one in ten women have been victims of revenge porn-type harassment, usually resulting in lost jobs, ended relationships, and social ostracization. *Id.* As domestic abuse and harassment crimes become increasingly complex, the legislature is attempting to curtail the breadth of people affected. To ignore a swath of people unconscious while intimate photographs are being taken of them is severely limiting the reach of the intent this statute has.

c. Recognized Indicia

Beyond § 3-809's legislative history and the general intent behind the statute, two other recognized indicia that may be useful in discerning the meaning of the phrase "engaged in" can be (1) how this statute relates to other laws and (2) how this statute is reasonably related to other statutes of its kind.

A similarly situated statute that may shed light as to what it means to be "engaged in" sexual activity is Maryland Criminal Law § 3-307 which governs sexual offense in the third degree. § 3-307(a)(2) specifically prohibits a person from "engage[ing] in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a

physically helpless individual." Maryland Criminal Law § 3-301(c)(1) defines a "physically helpless individual" partly as someone unconscious.

Both § 3-809 and § 3-307 protect from unwanted sexual activity, criminalizing any sexual act that has not been consented to. As these statutes are reasonably related to one another in legislative intent, it follows that a sexual act in a revenge porn medium that is unwanted or inflicted without consent is a rational interpretation of § 3-809. Therefore, a person may be unconscious and engaged in a sexual act for purposes of this statute.

Further, while only 41 states have revenge porn laws, 32 of those 41 states do not require the Victim to be engaged in any sexual activity to qualify the material as a revenge porn criminal offense. *State Revenge Porn Laws*, FindLaw (Jan. 13, 2020) https://criminal.findlaw.com/criminal-charges/revenge-porn-laws-by-state.html. Among these states, the common thread between a vast majority of the statutes revolves around an intent to harass or harm the Victim and a lack of consent to disseminate. VA. CODE ANN. § 18.2-386.2 (2020), D.C. CODE § 22-3051 (2020), W. VA. CODE § 61-8-28 (2020). As Maryland's Revenge porn prohibited statute is rationally related to other statutes regarding the criminality of revenge porn, the phrase to "engage in" is not the main focus of the statute but should be considered an involvement of any kind in sexual activity, consensual or unwanted.

d. Definition

Beyond legislative intent and other recognized indicia, it is helpful to know the black-letter definition of the phrase "engage in." Though there is no case law defining the legislative intent of the phrase "engaged in," the Merriam-Webster dictionary offers two definitions of the phrase "engage in:" (1) to do (something) or (2) to cause (someone) to take part in (something).

Engage In, https://www.merriam-webster.com/dictionary/engage%20in (last visited July 20, 2020).

Further, there is a distinction between an active engagement, which is a personal participation in something, and passive engagement which is having something done to you. Conor Hourihan, *Difference Between Passive and Active Engagement at Events*, Gallowglass Group (Jan. 29, 2020) https://www.gallowglass.com.[2] If, as the definition says, someone causes you to take part in something, you are passively engaged in that activity. Another form of passive engagement can be unconscious engagement. Therefore, a person can be "engaged in" sexual activity if unconscious and being caused to take part in the sexual activity by someone else.

III. CONCLUSION

For the reasons stated above, this Court finds that the photograph shared by the Defendant depicts the Victim "engaged" in sexual activity, as the statute covers unconsciousness at the time the sexual activity took place. Therefore, the Defendant violated Maryland Criminal Law § 3-809, Revenge porn prohibited.

[2] https://www.gallowglass.com/our-blog/events-industry-opinions/difference-between-passive-and-active-engagement-at-events/#:~:text=Passive%20engagement%20is%2C%20in%20its,lecture%20or%20watching%20someone%20demonstrate.&text=As%20an%20example%2C%20if%20you,be%20to%20fly%20it%20around

UPON CONSIDERATION of the foregoing, it is this _____ day of July 2020, that the District Court of Maryland for Montgomery County hereby **ORDERED** that Defendant is **GUILTY**.

[redacted]
District Court of Maryland for Montgomery County

cc:

Applicant Details

First Name	**Charles**
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Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2013**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 20, 2022**
Class Rank	**I am not ranked**
Law Review/ Journal	**Yes**
Journal(s)	**Jurisprudence Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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May 9, 2022

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr. Federal Courthouse
701 East Broad Street
Richmond, Virginia 23219

Dear Judge Hanes,

I am a third-year student at Washington University School of Law graduating on May 20, 2022, and I am writing to express my interest in the position of term law clerk in your chambers.

I am dedicated to a legal career focused on public service and promoting the public good. I am particularly interested in litigation as I would like to use my legal education to assure that all parties have access to effective and meaningful legal support. Working at Legal Services of Eastern Missouri and at the Equal Employment Opportunity Commission in St. Louis has shown me the vital importance of helping vulnerable people navigate the complexities of the court system. I believe that the experience I would gain by acting as your law clerk would be an invaluable introduction to a career as a litigator and as a public servant. I am particularly interested in appellate work.

During the summer after my second year of law school, I worked at Legal Services of Eastern Missouri in the Neighborhood Vacancy Initiative, where I assisted in drafting numerous legal documents and conducted legal research to assist neighborhood organizations in restoring vacant and abandoned buildings to productive use. Working there provided me with ample opportunity for legal writing, as well as experience with the day-to-day responsibilities of litigating cases and navigating complex administrative regulations.

My summer at the Equal Opportunity Commission in St. Louis after my first year of law school help me develop my legal research skills and gave me the opportunity to work on real cases involving discrimination, including conducting client interviews. This experience taught me how to analyze difficult regulatory rules as well as the importance of appropriate representation for individuals who are vulnerable and underserved.

I recently participated in the First Amendment Clinic at Washington University School of Law, where I wrote briefs to be submitted to the court and worked on response briefs on an abbreviated timeline. During my time at the Clinic, I worked with a team to brainstorm legal solutions to our clients' problems and gained real life skills in litigation, as well as honing my research and writing abilities. I was an Editor of the Jurisprudence Review and had my Note published in the Spring 2022 edition. I have also taken classes in Administrative Law, Evidence and Complex Litigation which I believe would prove helpful while clerking.

I am a good writer and communicator and very effective at framing issues and focusing arguments on the essential elements of a case. I am a quick learner and a proficient multi-tasker, and I have worked successfully in structured and unstructured environments both by myself and as part of a team. Prior to attending law school, I worked as a Legal Assistant at Sidley Austin in New York which also gave me hands-on experience in working in the legal profession, communicating with senior attorneys, and performing essential legal tasks on a wide variety of complex and fast paced legal issues.

I believe that my background, previous work experience, and demonstrated commitment to public service would allow me to make a positive contribution to your chambers. I would be happy to provide any additional information or material you might find useful.

Thank you for your consideration.

Sincerely,

Charles Clark

Charles Clark